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FEDERAL COMMUNICATIONS COMMISSION

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Federal Communications Commission Record

Volume 6
Issue 6

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... iv

Table of Rulemaking Numbers..... v

Table of Localities..... vi

Table by Subject Matter..... vii

Table by Statutory and Rule Provisions..... x

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 1448

Federal Communications Commission Record

Table of Cases
Volume 6
Issue 6

Case Name	Page
AT&T Communications	1516
AT&T Communications	1517
AT&T's Comparably Efficient Interconnection Plan	1506
Advisory Committee on Advanced Television Service	1523
Advisory Committee on Advanced Television Service	1565
Allnet Communication Services, Inc.	1515
Amendment of Part 2 - Emergency Radiobeacons	1462
Amendment of Parts 80 and 87 - Radiobeacons/Emergency Transmitters	1456
Amendment of Section 2.106 - Computing Devices	1566
American Telephone and Telegraph Co.	1580
American Telephone and Telegraph Co.	1581
American Telephone and Telegraph Company	1594
Ameritech Operating Companies	1541
Anderson Cablevision v. Duke Power Company	1562
Aspen FM, Inc.	1602
Bell Atlantic	1559
Bell Atlantic Telephone Companies	1595
BellSouth Telephone Companies	1592
Benton Ridge Telephone Company	1615
COMSAT General Corporation	1576
Cincinnati Bell Telephone Company	1598
Compass Rose Communications Corp.	1518
Contel Telephone Companies	1590
Cost Support Material for 1991 Annual Access Tariffs	1641
Depreciation Rate Changes	1610
Digital Devices (ERRATUM)	1605
ELBA Development Corporation (KQTV-TV)	1564
Earth Station Environmental Evaluation	1558
Editorial Amendment of Part 95, Subpart A (ERRATUM)	1601
Equal Access Requirements for Independent Telephone Companies	1575
Evergreen Broadcasting Company	1606
Fenwick Island Broadcast Limited Partnership I	1608
Fleet Call, Inc.	1533
Florida's Regional Public Safety Plan Amendment	1563
Fresno FM Limited Partnership	1570
GTE Mobilnet of Indiana Limited Partnership	1521
Haley, Sharron Annette	1567
Jacksonville Educators Broadcasting, Inc.	1617
Las Americas Communications, Inc.	1507
Low Power Transmitter Notification Requirement	1560
MCI Telecommunications Corporation	1582
NYNEX Telephone Companies	1600

Case Name	Page
National Exchange Carrier Association, Inc.	1596
New England Telephone and Telegraph Co.	1586
New York Telephone Company	1588
New York Telephone Company	1561
Northfield, William E.	1583
OTI Corporation	1611
Operator Service Access and Pay Telephone Compensation	1448
Opportunity Broadcasting of Shreveport	1499
Pacific Mutual Insurance Company	1545
Palmetto Communications Company (WDIX-AM)	1527
Price Cap Service Quality and Infrastructure Monitoring	1621
Syndication and Financial Interest Rule	1657
Table of Allotments, FM, Bowling Green, KY	1532
Table of Allotments, FM, Bronson, MI	1483
Table of Allotments, FM, Brookston and Monticello, IN	1505
Table of Allotments, FM, Brusly, LA and Woodville, MS	1554
Table of Allotments, FM, Caldwell, TX	1551
Table of Allotments, FM, Clinton, AR	1553
Table of Allotments, FM, Columbus, KS	1597
Table of Allotments, FM, Davis and Winters, CA	1556
Table of Allotments, FM, Greenup, KY and Athens, OH	1493
Table of Allotments, FM, Herington, KS	1485
Table of Allotments, FM, Karnes City, TX	1489
Table of Allotments, FM, Key Largo, FL	1502
Table of Allotments, FM, Littlefield, TX	1503
Table of Allotments, FM, Macclenny and Williston, FL	1480
Table of Allotments, FM, Marina, Salinas and Seaside, CA	1491
Table of Allotments, FM, Missoula, MT	1487
Table of Allotments, FM, New Iberia and Ville Platte, LA	1548
Table of Allotments, FM, Pasco, WA	1547
Table of Allotments, FM, Pullman, WA	1504
Table of Allotments, FM, Steeleville, IL	1478
Table of Allotments, TV, Jasper and Tuscaloosa, AL	1546
WWOR-TV, INC.	1524
Wallace Communications Consultants, and Drew Metal Corporation	1618
Wyoming Regional Public Safety Plan	1585

Federal Communications Commission Record

Table of Cases by Delegated Authority and FCC Number
Volume 6
Issue 6

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 91 - 229	1506	DA 91 - 297	1560
DA 91 - 230	1559	DA 91 - 298	1558
DA 91 - 236	1491	DA 91 - 299	1621
DA 91 - 250	1478	DA 91 - 300	1585
DA 91 - 251	1480	DA 91 - 301	1598
DA 91 - 252	1483	DA 91 - 303	1576
DA 91 - 253	1485	DA 91 - 304	1580
DA 91 - 254	1487	DA 91 - 305	1581
DA 91 - 255	1489	DA 91 - 306	1582
DA 91 - 265	1523	DA 91 - 307	1610
DA 91 - 266	1502	DA 91 - 308	1611
DA 91 - 267	1503	DA 91 - 309	1596
DA 91 - 268	1504	DA 91 - 310	1641
DA 91 - 269	1505	DA 91 - 311	1615
DA 91 - 270	1563	DA 91 - 312	1586
DA 91 - 271	1515	DA 91 - 313	1583
DA 91 - 272	1516	DA 91 - 314	1600
DA 91 - 273	1517	DA 91 - 315	1597
DA 91 - 274	1541	DA 91 - 320	1601
DA 91 - 275	1588	DA 91 - 324	1605
DA 91 - 276	1595	FCC 90I - 124	1606
DA 91 - 277	1565	FCC 91 - 41	1456
DA 91 - 280	1532	FCC 91 - 43	1462
DA 91 - 281	1590	FCC 91 - 53	1448
DA 91 - 282	1592	FCC 91 - 56	1533
DA 91 - 283	1594	FCC 91 - 61	1493
DA 91 - 284	1545	FCC 91 - 62	1507
DA 91 - 285	1575	FCC 91 - 64	1618
DA 91 - 286	1566	FCC 91 - 65	1524
DA 91 - 287	1562	FCC 91 - 66	1617
DA 91 - 288	1521	FCC 91 - 68	1602
DA 91 - 289	1561	FCC 91 - 81	1657
DA 91 - 290	1546	FCC 91I - 7	1564
DA 91 - 291	1547	FCC 91I - 15	1608
DA 91 - 292	1548	FCC 91R - 21	1518
DA 91 - 293	1551	FCC 91R - 22	1499
DA 91 - 294	1553	FCC 91R - 23	1570
DA 91 - 295	1554	FCC 91R - 24	1527
DA 91 - 296	1556	FCC 91R - 25	1567

Federal Communications Commission Record

Table of Cases by Docket Number
Volume 6
Issue 6

Docket Number				Page
BC	Dkt.No.82	-	763	1564
CC	Dkt.No.91	-	35	1448
GEN	Dkt.No.89	-	44	1605
GEN	Dkt.No.89	-	623	1462
MM	Dkt.No.84	-	115	1507
MM	Dkt.No.84	-	397	1606
MM	Dkt.No.86	-	29	1493
MM	Dkt.No.87	-	236	1608
MM	Dkt.No.87	-	424	1602
MM	Dkt.No.88	-	21	1570
MM	Dkt.No.88	-	382	1524
MM	Dkt.No.88	-	524	1499
MM	Dkt.No.88	-	581	1518
MM	Dkt.No.89	-	98	1556
MM	Dkt.No.89	-	357	1527
MM	Dkt.No.89	-	413	1554
MM	Dkt.No.89	-	614	1505
MM	Dkt.No.90	-	20	1491
MM	Dkt.No.90	-	108	1567
MM	Dkt.No.90	-	162	1657
MM	Dkt.No.90	-	281	1546
MM	Dkt.No.90	-	386	1504
MM	Dkt.No.90	-	446	1502
MM	Dkt.No.90	-	453	1597
MM	Dkt.No.90	-	521	1553
MM	Dkt.No.90	-	535	1532
MM	Dkt.No.90	-	554	1503
MM	Dkt.No.90	-	579	1547
MM	Dkt.No.91	-	51	1478
MM	Dkt.No.91	-	52	1480
MM	Dkt.No.91	-	53	1483
MM	Dkt.No.91	-	54	1485
MM	Dkt.No.91	-	55	1487
MM	Dkt.No.91	-	56	1489
MM	Dkt.No.91	-	57	1548
MM	Dkt.No.91	-	58	1551
PR	Dkt.No.89	-	622	1456
PR	Dkt.No.91	-	59	1585

Federal Communications Commission Record

Table of Cases by Rulemaking Number
Volume 6
Issue 6

Rulemaking Number	Page
RM - 4941	1493
RM - 5399	1493
RM - 6578	1462
RM - 6638	1556
RM - 6764	1554
RM - 7082	1502
RM - 7124	1491
RM - 7136	1505
RM - 7276	1504
RM - 7322	1546
RM - 7330	1547
RM - 7337	1597
RM - 7350	1489
RM - 7373	1480
RM - 7419	1551
RM - 7442	1503
RM - 7465	1553
RM - 7520	1532
RM - 7591	1483
RM - 7601	1548
RM - 7618	1566
RM - 7623	1485
RM - 7624	1487
RM - 7625	1478

Table of Cases by City
Volume 6
Issue 6

City/State	Page
Aspen, CO	1602
Athens, OH	1493
Bowling Green, KY	1532
Bronson, MI	1483
Brookston, IN	1505
Brusly, LA	1554
Caldwell, TX	1551
Clinton, AR	1553
Columbus, KS	1597
Davis, CA	1556
Evergreen, CO	1606
Fresno, CA	1570
Greenup, KY	1493
Herington, KS	1485
Jasper, AL	1546
Karnes City, TX	1489
Key Largo, FL	1502
Lafayette, IN	1521
Littlefield, TX	1503
Macclenny, FL	1480
Marina, CA	1491
Missoula, MT	1487
Monticello, IN	1505
New Iberia, LA	1548
Newark, NJ	1507
Pasco, WA	1547
Phoenix, AZ	1518
Pullman, WA	1504
Salinas, CA	1491
Seaside, CA	1491
Secaucus, NJ	1524
Shreveport, LA	1499
St. Joseph, MO	1564
Steeleville, IL	1478
Sumter, SC	1567
Tuscaloosa, AL	1546
Ville Platte, LA	1548
Washington, DC	1559
Williston, FL	1480
Winters, CA	1556
Woodville, MS	1554
Yadkinville, NC	1527

Federal Communications Commission Record

Subject Index
Volume 6
Issue 6

Subject	Page
Adjudication	
Administrative Law Judge Decision	
Abuse of process	1524
Distribution of broadcast facilities	1527
Financial qualifications	1518, 1499, 1524, 1507, 1602
Integration of ownership into management, quantitative aspect	1606
Licensee responsibility	1570
Misrepresentation and lack of candor	1507
Reopening of record	1524, 1507
Site availability or suitability	1606, 1602
Aviation Services	
Developmental operation	
Frequencies assigned and available	1456
Broadcast Radio Services - General Rules	
Applications for authorization	
Conflicts in applications, agreement for removing	1507, 1608
Public inspection file of commercial stations, local	1507
Public notice of filing of broadcast applications, local	1617
Changes, renewals in existing stations	
Changes in existing stations, application for	1564
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	1491, 1493, 1489, 1478, 1480, 1483, 1485, 1487, 1502, 1503, 1504, 1505, 1532, 1547, 1548, 1551, 1553, 1556, 1554, 1597
Distances between stations, minimum	1606
Broadcasting - TV Stations	
Allocations/assignments/licenses	
Table of assignments	1546
Carriers: Service Altered	
Discontinuance/reduction/impairment	
Public coast station, applications to close/reduce service at	1580
Extensions and supplements	
Applications, contents of	1581, 1582

FEDERAL COMMUNICATIONS COMMISSION

Subject	Page
Commission Organization	
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	1541, 1588, 1590, 1594, 1561, 1621, 1600, 1641
Delegations of authority - General Counsel	
Authority delegated, listing of	1564
Common Carriers: Miscellaneous Rules	
Enhanced services (computer) and customer-premises equipment	1506, 1559
Communications Act of 1934	
Common Carriers	
Charges, schedules of	1618
Complaints to the commission	1516, 1618
Extension of lines, certificate for	1580, 1582, 1611
Pole attachments, regulation of	1562
Procedural and Administrative provisions	
Reconsiderations of actions taken by Commission	1617
Radio, provisions relating to	
Applications;form of and conditions attached to licenses	1576
Construction permits	1576
Licenses, limitation on holding and transfer of	1611
Maritime Services	
Technical standards for coast and ship stations	
Emission limitations, schedule of	1456
Voluntary telegraphy	
EPIRB - Emergency position indicating radiobeacon	1456
Personal Radio Services: GMRS, R/C, CB	
GMRS - operation of a system	
Communications permitted	1601
Practice and Procedure	
Hearing proceedings: participants and issues	
Intervene, petitions to	1586
Hearing proceedings: review proceedings	
Decision, appeal and review of initial	1524
Information, general	
Declaratory rulings	1545, 1596
Pleadings, briefs	
Extension of time, motions for	1608
Informal requests for Commission action, persons may make	1586
Reconsideration/review of Commission action	
Actions by delegated authority, application for review of	1602

Subject	Page
Private Land Mobile Radio Services	
Licensing/use of frequencies in 806-821, 851-866 MHz bands	
Loading requirements for trunked systems	1533

TABLE OF STATUTORY AND RULE PROVISONS

	Page
000.251 General Counsel Authority delegated	1564
001.002 Declaratory rulings	1545
001.002 Declaratory rulings	1596
001.041 Informal requests for Commission action	1586
001.046 Motions for extension of time	1608
001.115 Application for Review	1602
001.223 Petitions to Intervene	1586
001.301 Appeal, Denied	1567
001.411 Commencement of Rulemaking Proceedings	1448
022.903 Cellular system service areas	1521
022.903 Cellular system service areas	1583
036.380 Other billing and collecting expense	1596
063.001, Contents of Applications	1581
063.001, Contents of Applications	1582
063.069, Contents of Applications to Close or Reduce Hours/P	1580
069.407 Revenue accounting expenses in Account 6620	1596
073.202 FM Table of Allotments	1478
073.202 FM Table of Allotments	1480
073.202 FM Table of Allotments	1483
073.202 FM Table of Allotments	1485
073.202 FM Table of Allotments	1487
073.202 FM Table of Allotments	1491
073.202 FM Table of Allotments	1502
073.202 FM Table of Allotments	1503
073.202 FM Table of Allotments	1504
073.202 FM Table of Allotments	1505
073.202 FM Table of Allotments	1532
073.202 FM Table of Allotments	1547
073.202 FM Table of Allotments	1548
073.202 FM Table of Allotments	1551
073.202 FM Table of Allotments	1553
073.202 FM Table of Allotments	1554
073.202 FM Table of Allotments	1556
073.202 FM Table of Allotments	1597
073.202, FM Table of Allotments	1489
073.202, FM Table of Allotments	1493
073.207 Minimum distance separation between stations	1606
073.3525 Agreement for removing application conflicts	1507
073.3525 Agreements for removing application conflicts	1608
073.3526 Local public inspection file of commercial stations	1507
073.3538 Application to make changes in an existing station	1564
073.3580 Application for Voluntary Assign. or Transfer of Co	1617
073.606 TV Table of Allotments	1546
080.1061 Special requirements for 406 MHz EPIRBs	1456
080.211 Emission limitation	1456
087.147 Type acceptance of equipment	1456
087.187 Frequencies	1456
090.631(e) Trunked systems loading, construction and authori	1533
095.181 Permissible communications	1601
300.203 Schedules of Charges	1618

300.208 Complaints to the Commission 1515
300.208 Complaints to the Commission 1516
300.208 Complaints to the Commission 1618
300.214 Extension of Lines 1580
300.214 Extension of Lines 1581
300.214 Extension of Lines 1582
300.214 Extension of Lines 1611
300.224 Regulation of pole attachments 1562
300.303 General Powers of Commission 1448
300.309, Action Upon Appls.; Form of & Conds. Attached to Li 1576
300.310 Limitation on Holding and Transfer of Licenses 1611
300.319 Construction Permits 1576
300.405 Reconsiderations 1617
311 Settlement Agreements 1606
311 Settlement Agreements 1608
400.1518 Hart-Scott-Rodino Antitrust Improvements Act of 197 1611
47 C.F.R. 69, Access Charges 1575
47 C.F.R. Section 0.291 delegated authority 1541
47 C.F.R. Section 0.291 delegated authority 1561
47 C.F.R. Section 0.291 delegated authority 1588
47 C.F.R. Section 0.291 delegated authority 1590
47 C.F.R. Section 0.291 delegated authority 1592
47 C.F.R. Section 0.291 delegated authority 1595
47 C.F.R. Section 0.291 delegated authority 1598
47 C.F.R. Section 0.291 delegated authority 1600
47 C.F.R. Section 0.291 delegated authority 1621
47 C.F.R. §64.702, Furnishing of Enhanced Services and CPE 1506
47 CFR Section 69, Access Charges 1615
500.3035 Integration of Ownership into management, quantitat 1606
500.3085 307b, Distribution of Broadcast Facilities 1527
500.3120 Licensee Responsibility 1570
500.3125 Misrepresentation and lack of candor 1507
500.3135 Real Party in Interest 1499
500.3165 Environmental impact 1602
500.3170 Financial Qualifications 1499
500.3170 Financial qualifications 1507
500.3170 Financial Qualifications 1518
500.3170 Financial qualifications 1602
500.3180 Site Availability or Suitability 1518
500.3180 Site availability or suitability 1602
500.3180 Site availability or suitability 1606
500.3200 Reopening of record 1507
Voice and data communications; 47 Section 0.291 authority de 1594

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-35

In the Matter of

Policies and Rules Concerning
Operator Service Access and
Pay Telephone Compensation

NOTICE OF PROPOSED RULE MAKING

Adopted: February 13, 1991; Released: March 11, 1991

By the Commission:

I. INTRODUCTION

1. We adopt this Notice of Proposed Rule Making to propose rules and raise questions regarding operator service access and pay telephone compensation. First, we seek comment on alternative rule provisions that would require either: access to operator services through the use of equal access codes;[1] or the establishment of an 800 or 950 access method by operator service providers (OSPs). Second, we seek comment on issues related to compensation for owners of competitive public payphones for access code calls.

II. BACKGROUND

2. The divestiture of AT&T led to the entry of competitors into the interstate operator services industry that had previously been dominated by the Bell System.[2] The newer OSPs, sometimes referred to as alternative operator service (AOS) companies, generally lease lines from telephone carriers and combine these transport elements with their own operator services. Then, like the more traditional OSPs, they enter into contracts to provide operator services[3] to call aggregators.[4] A caller using an aggregator's telephone will automatically be connected to this "presubscribed" OSP unless an access code is dialed.

3. One result of this expansion of the operator services industry has been "widespread consumer dissatisfaction over the rates and practices of many operator service providers."[5] In response to this situation, the Commission took two major steps to address problems involving the operator services industry. First, in 1989, the Common Carrier Bureau (Bureau) granted in part a complaint filed by two consumer advocacy groups against five AOS companies.[6] The Bureau ordered the defendant companies to, *inter alia*: (1) provide written information about their services to be posted on or near presubscribed telephones; (2) identify themselves audibly at the beginning of calls, a process known as "call branding"; (3) discontinue the blocking of access to other OSPs; and (4) cease "call splashing" to the extent technically possible.[7] Second, in June 1990, this Commission adopted the initial *NPRM* in CC Docket No. 90-313. In the *NPRM*, we proposed specific rules aimed at solving problems in the industry that had persisted despite previous Commission action.[8] These rules addressed the issues of consumer information, call blocking, call splashing, interexchange carrier access, and equipment capabilities.

4. During the comment period for CC Docket No. 90-313, the Telephone Operator Consumer Services Improvement Act of 1990 was signed into law.[9] The Act, *inter alia*, requires the Commission to conduct two rule making proceedings:[10] first, a proceeding that will result in the adoption of certain "general" regulations;[11] and, second, a separate proceeding in which we must consider access and payphone compensation issues.[12] The general regulations, as described by the Act, must address many of the same issues dealt with by the rules proposed in the initial *NPRM* in CC Docket No. 90-313. Because of various differences between the statutory provisions and our original proposed rules, however, we adopted a *Further NPRM* in December 1990 to propose rules modeled directly on the language of the Act.[13] The new proposed rules supplant those originally proposed in that proceeding. At the same time, we also initiated the monitoring/reporting proceeding required by the Act and designated it "Phase II" of CC Docket No. 90-313.[14]

5. We noted in the *Further NPRM*[15] that the Operator Services Act would alter our consideration of access and payphone compensation issues. In the initial *NPRM*, we had proposed rules requiring both the unblocking of the 10XXX access code and the establishment of 800 or 950 access by all carriers.[16] During the comment period in CC Docket No. 90-313, parties submitted views on these proposals. A number of parties also commented on what they described as the need to prescribe compensation for owners of competitive public payphones for calls not routed through their presubscribed OSPs.[17] Although comments regarding access and compensation are part of the record in CC Docket No. 90-313, Section 226(e) of the Operator Services Act [18] specifically requires that we conduct a separate rule making proceeding to address access and compensation issues:

> (e) Separate Rulemaking on Access and Compensation.--
>
> (1) Access.--The Commission, within 9 months after the date of enactment of this section, shall require--
>
> (A) that each aggregator ensure within a reasonable time that each of its telephones presubscribed to a provider of operator services allows the consumer to obtain access to the provider of operator services desired by the consumer through the use of an equal access code; or
>
> (B) that all providers of operator services, within a reasonable time, make available to their customers a "950" or "800" access code number for use in making operator services calls from anywhere in the United States; or
>
> (C) that the requirements described under both subparagraphs (A) and (B) apply.

(2) Compensation.--The Commission shall consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones. Within 9 months after the date of enactment of this section, the Commission shall reach a final decision on whether to prescribe such compensation.

With the adoption of this Notice of Proposed Rule Making, we now initiate the separate proceeding on access and payphone compensation issues. Any relevant comments filed in CC Docket No. 90-313 will be made a part of the record in this proceeding.[19]

III. DISCUSSION

A. Operator Service Access

6. First, we address the issue of operator service access. Section 226(e)(1) of the Operator Services Act directs the Commission to require within 9 months after enactment (a) that aggregators ensure within a reasonable time that consumers have access to the carrier of their choice through the use of an equal access code,[20] or (b) that all OSPs make available a "950" or "800" access code number.[21] or (c) both (a) and (b).[22]

7. Our overriding point of departure in considering whether one or both of these operator service access methods is necessary is to ensure that consumers can freely reach their desired carriers. As a matter of long-term policy, we see two main reasons for considering 10XXX access to be an important method for achieving this goal. First, in the Operator Services Act, Congress directed that all aggregator equipment manufactured or imported after April 17, 1992, "be technologically capable of providing consumers with access to interstate providers of operator services through the use of equal access codes." [23] Hence, by virtue of this requirement alone, 10XXX access will eventually be available from most aggregator locations as equipment is replaced. Second, 10XXX access appears to provide both consumers and carriers with more technical flexibility and choice than do other access methods.

8. Considering these factors, we propose to amend Sections 64.704 and 68.318 as set out in the Appendix so as to require, within 3 years, 10XXX access from all aggregator locations. Under our proposed Section 64.704(c)(1), aggregators who use existing equipment that can now identify and selectively block 10XXX dialing sequences that would result in billing to the originating telephone would have to unblock all other 10XXX access immediately. Proposed subsection (c)(2) requires aggregators to provide 10XXX access through any new equipment that is covered by Section 226(f) of the Act. Subsections (c)(3) and (c)(4) concern other existing aggregator equipment. These subsections would require aggregators to ensure 10XXX access within 12 months of the effective date of these rules for payphones and within 36 months of the effective date of these rules or at the time of equipment replacement, whichever is sooner, for other existing equipment. We seek comment on what types of equipment, in addition to private branch exchanges ("PBXs"), would come within the scope of the 36-month rule.

9. In Section 68.318(e), we propose, *inter alia*, modification requirements for existing equipment consistent with subsections (c)(3) and (c)(4) of Section 64.704. Under proposed subsections (e)(1)(B) and (e)(2)(B) of Section 68.318, existing aggregator equipment would be required to have the capability of identifying and selectively blocking 10XXX dialing sequences that would result in billing to the originating phone, without, at the same time, blocking 10XXX calls that would be billed to the caller or an authorized third party. Given such capabilities, we have also proposed, in Section 64.704(c)(5), that aggregators be allowed to block 10XXX calls that would result in billing to the originating telephone.[24] These proposals are intended to eliminate, in the long run, any unauthorized, fraudulent, or otherwise uncollectible 10XXX calls being charged to payphone owners and other aggregators, such as hotels, hospitals, airports, and universities,[25] while at the same time allowing consumers to use the 10XXX access method if they wish. Parties should comment on what sort of cost/benefit analysis should be employed in considering requests for waivers of an equipment retrofitting requirement. We also seek comment on how we should deal with fraudulent 10XXX calling on a short-term basis, until existing equipment is modified to selectively process 10XXX calls. One option, for example, would be to allow the blocking of all 10XXX calls until such equipment changes are made. More generally, we seek specific comments on the magnitude of the fraud problem and on specific methods that would be available now or in the near future to control this problem. Comments should address, but are not limited to, the use of toll restrictors, and CPE or network solutions that are or may become available.[26] One alternative to our equipment retrofitting proposal, for example, would be to require local exchange carriers (LECs) to provide a tariffed screening service that would identify and selectively block 10XXX calls that would result in billing to the originating telephone. We ask interested parties to comment on the feasibility of each of these possible requirements and on how each would bear on the timing of 10XXX unblocking.

10. Another issue regarding existing equipment is whether the conversion to 10XXX capability should be required, as we have proposed, by definite dates, thus requiring the modification of equipment, or whether conversion to 10XXX capability should occur by attrition as nonconforming equipment is replaced. In considering definite deadlines for conversion, we seek comment on the cost of modifying particular types of equipment and on how changing the deadlines might alter those costs. On the other hand, in considering an approach that would allow conversion to 10XXX capability upon the replacement of equipment, we seek comment on whether allowing conversion by attrition satisfies the Act's requirement that aggregators ensure access "within a reasonable time." Also with respect to this attrition approach, we are interested in parties' comments on how the lengths of the lives of various aggregator equipment types[27] would affect the timing of nationwide 10XXX unblocking. We also ask parties to comment on how enforcement efforts would proceed without definite deadlines for conversion to 10XXX capability.

11. Although we think that universal establishment of 10XXX access should be our long-term goal, we seek comment on whether establishment of 800 or 950 access by all OSPs is also in the public interest, either on a short-term or a long-term basis. While one of our options is to require 10XXX unblocking alone, the option of requiring a combination of 10XXX unblocking and the establishment of 800 or 950 access might be necessary because of the short-term or long-term unavailability of the 10XXX access method. Short-term unavailability occurs when existing aggregator equipment has not yet been modified to provide 10XXX access. One way to ensure access to all OSPs until equipment is modified would be to require the temporary establishment of 800 or 950 access by all OSPs until such time as 10XXX access is unblocked as proposed herein. Informal estimates indicate that 800 or 950 access could be implemented by all OSPs within six months. Hence, 800 or 950 numbers could provide an interim form of access for the three-year period during which equipment modification is occurring. Although we understand that all carriers may not wish to employ 800 or 950 access numbers, we seek comment on such a requirement so that we may gauge the utility of this option. In considering whether to adopt an alternative access provision, we will need to know how the cost of providing 800 or 950 access would compare to the costs of fraudulent 10XXX calling and of retrofitting equipment to selectively process 10XXX calls.

12. Access through 10XXX will also be unavailable, in the long term, in areas of the country that have not yet converted to equal access[28] or where certain equipment is permanently unable to process 10XXX dialing. In either situation, a caller will be unable to reach an OSP that employs only 10XXX access if the telephone is not presubscribed to that OSP. We therefore seek comment on whether these cases of long-term 10XXX unavailability would justify our requiring the permanent establishment of 800 or 950 access by all OSPs, as proposed in Section 64.704(d). We also seek comment on whether any other special provision should be made for non-equal access areas and on whether consumers have sufficiently free access to their preferred carriers in these areas, despite the lack of 10XXX access. While we do not, at this time, propose specific rules applicable to non-equal access areas, we seek comment on the possibility of requiring the LECs to provide, until conversion to equal access, a tariffed service in which the LECs would, upon receiving a "0-" call, transfer the call to the consumer's requested OSP. More generally, we seek comment on whether such a tariffed service should be required nationwide and ask interested parties to comment specifically on the costs of implementation, the technical feasibility, and the effectiveness of a "0-" transfer service.

B. Payphone Compensation

13. The Operator Services Act directs us to determine "*whether* to prescribe ... compensation" for owners of competitive public payphones for access code calls.[29] Generally, call aggregators, including competitive public payphone owners, are compensated by the presubscribed OSP for all calls placed through that OSP. Aggregators receive no compensation, however, for access code calls, and this situation grows as access code calling is increasingly facilitated by unblocking. In considering the overall issue of whether to prescribe compensation, our primary goal will be to determine the best way to foster a marketplace in which participants compete based on the merits of the services they offer to consumers. We must also consider whether, if compensation is prescribed, it will equitably allow payphone owners to recover their costs due to access code calls, without, at the same time, creating any undue increase in the cost of providing service to consumers.

14. At the outset, we ask interested parties to comment on whether we should declare that we will not prescribe compensation, which is within our discretion under the Act. This option would not necessarily leave payphone owners without compensation for access code calls. They could, for example, charge callers a flat fee for all access code calls that would be similar to the charge for local calls, provided that the same charge applied to presubscribed calls and was otherwise consistent with federal and state law.[30] Alternatively, payphone owners could treat the cost of access code calls through non-presubscribed OSPs as a cost of doing business and continue to receive compensation from the OSPs with which they have contractual agreements. This option would be the least intrusive regulatory approach, and interested parties should comment on whether the public interest would be served by foregoing prescribed compensation altogether.

15. If we were to prescribe compensation, charges for access code calls could be assessed and disbursed through a compensation pool, and we ask interested parties to comment on this potential approach. We suggest two alternative mechanisms for such a pool. The first alternative would require each OSP to submit to the administrator of a compensation pool a report of the total number of calling minutes generated by access code calls[31] from competitive public payphones. The administrator would then assess and bill each OSP a per minute charge for such calls. OSPs would pay these charges into the compensation pool, and the administrator would distribute compensation to payphone owners based on their reports of the number of access code calling minutes generated by their payphones.[32] This type of compensation plan, we think, has certain equitable aspects. By specifying a per minute charge rather than a per call charge, the plan would require OSPs to pay only for the time that an access code call actually utilizes payphone equipment. Further, a pooling arrangement would allow efficient, centralized administration of the collection of these charges and disbursement of the compensation.

16. A number of questions regarding such a compensation pool must be answered. First, how should the per minute charge be calculated? What per minute charge should be prescribed? Would a flat per call charge be more appropriate than a per minute charge? Further, if compensation were limited to calls originated by dialing an access code, could OSPs and payphone owners distinguish such calls from other payphone traffic for accounting purposes?

17. The second alternative would be to develop a payphone compensation pool to which each OSP would contribute a certain percentage of its estimated gross proceeds from all interstate payphone calls, whether or not an access code was used. Each payphone owner would then receive compensation from the pool equal to a percentage of all interstate revenue generated by its payphones. With this option, payphone owners might have less incentive to enter into presubscription arrangements, and compensation from the pool might therefore

replace commissions from presubscribed OSPs.[33] This compensation mechanism might require alteration of the current relationships between OSPs and aggregators who are payphone owners, but it would also ensure a stable level of compensation for these payphone owners. Further, while this mechanism might require callers to dial access codes for all interstate payphone calls, it might have the advantage of encouraging OSPs to compete based on the merits of the services they offer to callers rather than on the commissions they pay to aggregators.[34] One question about this pooling mechanism that must be answered is whether OSPs will be able to distinguish payphone traffic from other traffic. We seek comment on this and any other issues raised by this pooling mechanism.

18. We also seek comment on three additional matters concerning both pooling mechanisms. First, we seek comment on the enforceability of these mechanisms, including enforcement problems they might raise and how these problems might best be addressed. Second, we must determine whether charges should be computed, collected from OSPs, and disbursed to payphone owners on a monthly basis, as proposed. We are interested in parties' views on whether a monthly basis for assessment and disbursement would be efficient, economical, and otherwise in the public interest. Third, we seek comment on what entity should administer a payphone compensation pool. For example, an industry organization similar to the National Exchange Carrier Association (NECA) might be an appropriate candidate for the responsibility of implementing and operating a pool.[35]

19. We also seek comment on an alternative compensation mechanism, whereby we would prescribe compensation that is based on a per minute charge for access code calls but is collected by payphone owners through individual, direct billing arrangements with OSPs. This mechanism could, of course, employ a flat per call charge instead of a per minute charge, if such a variation were deemed more appropriate. We seek comment on any issues raised by this alternative, including the method by which to determine and calculate a per minute or per call charge.

20. We recognize that the alternative compensation mechanisms discussed here are potentially complex and expensive. We invite parties to suggest any more efficient or less costly options. In addition, we are particularly interested in comments on how the potential complexity and expense of any compensation mechanism, including the administrative costs and the costs to consumers, should affect our cost/benefit analysis of whether to prescribe compensation at all.

21. Finally, in addition to seeking comment on the specific payphone compensation options above, we ask interested parties to address a number of general issues related to these options. First, we seek comment on which payphones should be covered by any compensation mechanism we might prescribe[36] and on how payphone registration should be treated in making such a determination. We also seek comment on how calling traffic subject to compensation could be verified and on how disputes over such accounting could be resolved through private means, such as binding arbitration. In addition, we ask parties to recommend possible methods for the recovery of administrative costs that would result from the various compensation options.

IV. INITIAL REGULATORY FLEXIBILITY ANALYSIS

22. **Reason for action.** Pursuant to the Telephone Operator Consumer Services Improvement Act of 1990, which requires a rule making proceeding on operator service access and pay telephone compensation issues, the Commission is issuing this Notice of Proposed Rule Making to provide an opportunity for public comment and to provide a record for a Commission decision on the issues stated above.

23. **Objectives.** The objective of this Notice of Proposed Rule Making is to initiate a proceeding to prescribe regulations that will ensure that operator services are provided in a manner that fosters a fully competitive operator services industry and allows callers to exercise choice freely in selecting services.

24. **Legal basis.** Sections 1, 4(i), 4(j), 201-205, 218, 226, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § 151, 154(i), 154(j), 201-205, 218, 226, 303(r).

25. **Description, potential impact, and number of small entities affected.** The proposed rules will require that call aggregators in the operator services industry allow access to operator service providers through the 10XXX access code and that aggregators modify their equipment if necessary. The rules will also require operator service providers to establish alternative access methods and may require them to compensate competitive public payphone owners for calls not routed through the presubscribed provider. Aggregators and operator service providers that are small entities may feel some economic impact due to these requirements.

26. **Reporting, recordkeeping, and other compliance requirements.** The proposed rules contain no reporting or recordkeeping requirements.

27. **Federal rules which overlap, duplicate, or conflict with the Commission's proposal.** None.

28. **Any significant alternatives minimizing impact on small entities and consistent with stated objectives.** We shall consider any alternatives suggested in comments that are consistent with the requirements of the Operator Services Act.

29. **Comments are solicited.** We request written comments on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to this Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act. *See* 5 U.S.C. 601, *et seq.*

V. EX PARTE REQUIREMENTS

30. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a) of the Commission's Rules, 47 C.F.R. 1.1206(a). The Sunshine Agenda period is the period of time that commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice

stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f) of the Commission's Rules, 47 C.F.R. 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203 of the Commission's Rules, 47 C.F.R. 1.1203.

31. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel that (1), if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b) of the Commission's Rules, 47 C.F.R. 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

32. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary, with a copy to the Commissioner or staff member involved, that summarizes the data and arguments. The memorandum, as well as any transmittal letter, must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. Section 1.1206 of the Commission's Rules, 47 C.F.R. 1.1206.

33. All relevant and timely comments and reply comments will be considered by this Commission. In reaching our decision, this Commission may take into account information and ideas not contained in the comments, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of this Commission's reliance on such information is noted in the Order.

VI. CONCLUSION AND ORDERING CLAUSES

34. In summary, the access rules proposed in this Notice are intended to ensure that consumers have the opportunity to choose freely among the available interstate operator services. In addressing the issue of payphone compensation, we seek to encourage an environment in which "the legitimate companies in the industry [have] the opportunity to compete in the market.[37] In general, we expect the proposed rules to help foster a marketplace in which operator service providers compete based on the merits of their services, rather than on the payments they provide to aggregators who deliver to them a captive clientele. In submitting comments on these proposed rules, interested parties should note that we are particularly interested in evidence regarding the technical and operational complexities of implementing the proposed rules. We are also interested in the economic impact of implementation in terms of costs to or burdens on consumers, OSPs, and call aggregators.

35. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205, 218, 226, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § 151, 154(i), 154(j), 201-205, 218, 226, 303(r), that a NOTICE OF PROPOSED RULE MAKING IS ISSUED, proposing the amendment of 47 C.F.R. Parts 64 and 68 as set forth in the Appendix.

36. IT IS FURTHER ORDERED, pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. § 1.415, 1.419, that all interested parties may file comments on the matters discussed in this Notice and on the proposed rules contained in the Appendix by **April 5, 1991** and reply comments by **April 19, 1991.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants wish each Commissioner to have a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 230) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

37. IT IS FURTHER ORDERED that the Chief of the Common Carrier Bureau is delegated authority to require the submission of additional information, make further inquiries, and modify the dates and procedures if necessary to provide for a fuller record and a more efficient proceeding.

38. IT IS FURTHER ORDERED that the Secretary shall cause a copy of this Notice, including the Initial Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. 603(a) (1981). The Secretary shall also cause a summary of this Notice to appear in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

PROPOSED RULES

It is proposed that Part 64 of Title 47 of the Code of Federal Regulations be amended as follows:

1. The authority citation for Part 64 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended, 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 226, 48 Stat. 1070, as amended, 1077, 47 U.S.C. § 201, 218, 226, unless otherwise noted.

2. Section 64.704 is amended by reserving paragraphs (a) and (b) by adding paragraphs (c) and (d) to read as follows:

§ 64.704 Call blocking prohibited.

*****

(c) Each aggregator shall ensure, by the earliest applicable date, that any of its equipment presubscribed to a provider of operator services allows the consumer to use equal access codes to obtain access to the consumer's desired provider of operator services as set forth in paragraphs (c)(1), (c)(2), (c)(3), and (c)(4) of this section.

(1) All equipment that is technologically capable of identifying the dialing of an equal access code followed by any sequence of numbers that will result in billing to the originating telephone and that is technologically capable of blocking access through such dialing sequences without blocking access through other dialing sequences involving equal access codes, shall immediately allow the consumer to use equal access codes to obtain access to the consumer's desired provider of operator services.

(2) All equipment or software that is manufactured or imported on or after April 17, 1992, and installed by any aggregator shall, immediately upon installation by the aggregator, allow the consumer to use equal access codes to obtain access to the consumer's desired provider of operator services.

(3) Each pay telephone shall, within twelve (12) months of the effective date of this paragraph, allow the consumer to use equal access codes to obtain access to the consumer's desired provider of operator services.

(4) All equipment not included in paragraphs (c)(1), (c)(2), or (c)(3) shall, within thirty-six (36) months of the effective date of this paragraph or upon replacement, whichever is sooner, allow the consumer to use equal access codes to obtain access to the consumer's desired provider of operator services.

(5) This paragraph does not apply to the use of equal access code dialing sequences that result in billing to the originating telephone.

(d) All providers of operator services must establish an "800" or "950" access code number within six (6) months of the effective date of this paragraph.

It is proposed that Part 68 of Title 47 of the Code of Federal Regulations be amended as follows:

1. The authority citation for Part 68 continues to read as follows:

Authority: Secs. 4, 201, 202, 203, 204, 205, 208, 215, 218, 226, 313, 314, 403, 404, 410, 602, 48 Stat., as amended, 1066, 1070, 1071, 1072, 1073, 1076, 1077, 1087, 1094, 1098, 1102, 47 U.S.C. § 154, 201, 202, 203, 204, 205, 208, 215, 218, 226, 313, 314, 403, 404, 410, 602, unless otherwise noted.

2. Section 68.318 is amended by reserving paragraph (d) and adding paragraph (e) to read as follows:

§ 68.318 Additional limitations.

*****

(e) *Requirement that existing registered equipment allow access to common carriers.*

(1) Any pay telephones used by call aggregators shall, within twelve (12) months of the effective date of this paragraph:

(A) be technologically capable of providing consumers with access to interstate providers of operator services through the use of equal access codes; and

(B)(i) be technologically capable of identifying the dialing of an equal access code followed by any sequence of numbers that will result in billing to the originating telephone and (ii) be technologically capable of blocking access through such dialing sequences without blocking access through other dialing sequences involving equal access codes.

(2) Any equipment used by call aggregators that is not provided for in paragraph (e)(1) shall, within thirty-six (36) months of the effective date of this paragraph:

(A) be technologically capable of providing consumers with access to interstate providers of operator services through the use of equal access codes; and

(B)(i) be technologically capable of identifying the dialing of an equal access code followed by any sequence of numbers that will result in billing to the originating telephone and (ii) be technologically capable of blocking access through such dialing sequences without blocking access through other dialing sequences involving equal access codes.

(3) Equipment described in paragraphs (e)(1) and (e)(2) shall be modified as necessary and re-registered if required by Section 68.214. Any software modifications required to achieve compliance with this paragraph shall be installed in a manner that cannot readily be altered by the user.

FOOTNOTES

[1] An "access code" is a sequence of numbers that, when dialed, connects the caller to the operator service provider associated with that sequence. 47 U.S.C. § 226(a)(1). An "equal access code" is an access code that allows the public to obtain an equal access connection to the carrier associated with that code. 47 U.S.C. § 226(a)(6). "Equal access" has the meaning given that term in Appendix B of the Modification of Final Judgment entered August 24, 1982, in United States v. Western Electric, Civil Action No. 82-0192 (United States District Court, District of Columbia), as amended by the court in its orders issued prior to the enactment of 47 U.S.C. § 226. 47 U.S.C. § 226(a)(5).

[2] A full discussion of the development of the operator services industry and the proceedings related to operator service issues is contained in Policies and Rules Concerning Operator Service Providers: Notice of Proposed Rule Making, CC Docket No. 90-313, 5 FCC Rcd 4630, 4630-31 (1990) (hereinafter *NPRM*). *See also* Further Notice of Proposed Rule Making, CC Docket No. 90-313, 6 FCC Rcd 120, 120 (1990) (hereinafter *Further NPRM*).

[3] The term "operator services" refers to "any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than -- (A) automatic completion with billing to the telephone from which the call originated; or (B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer." 47 U.S.C. § 226(a)(7).

[4] An "aggregator" is any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services. 47 U.S.C. § 226(a)(2).

[5] *NPRM*, 5 FCC Rcd at 4630.

[6] Telecommunications Research & Action Center v. Central Corp., 4 FCC Rcd 2157 (Com. Car. Bur. 1989) (hereinafter *TRAC Order*), *application for review pending*.

[7] *Id.* at 2159; *see also id.* at 2160 nn.5-6 (definitions of "call blocking" and "call splashing").

[8] *NPRM*, 5 FCC Rcd at 4631-35, 4637-38.

[9] Pub. L. No. 101-435, 104 Stat. 986 (1990) (to be codified at 47 U.S.C. § 226) ("Operator Services Act"). The President signed the Act on October 17, 1990.

[10] In addition, under the Act all OSPs and aggregators must, by January 15, 1991, comply with certain "general" statutory requirements. 47 U.S.C. § 226(b)-(c). The Act also requires OSPs to file with the Commission informational tariffs describing their rates, terms, commission, surcharges, fees collected from consumers, and the amount of traffic priced at each rate level. *Id.* § 226(h)(1)(A). Further, the Act directs the Commission to conduct a monitoring and reporting proceeding to examine operator service rates, service offerings, complaints, compliance, commissions, and other costs. This proceeding will result in the submission of three reports to Congress over a two-year period. Unless the Commission concludes in the final report that market forces are securing just and reasonable rates, the Commission must adopt rules to ensure such rates. *Id.* § 226(h)(3)-(4).

[11] 47 U.S.C. § 226(d).

[12] *Id.* § 226(e).

[13] 6 FCC Rcd 120 (1990). The text of the Telephone Operator Consumer Services Improvement Act of 1990 is included in Appendix A of the *Further NPRM*, and, thus, the statutory provisions relevant to this separate proceeding are not reproduced with this Notice.

[14] *Id.* at 121-22 (required by Section 226(h)(3) of the Act).

[15] *Id.* at 122.

[16] *NPRM*, 5 FCC Rcd at 4632, 4634, 4637 (proposed Sections 64.704, 64.706(a)).

[17] *See, e.g.*, comments of the American Public Communications Council, CC Docket No. 90-313, at 19-38.

[18] 47 U.S.C. § 226(e).

[19] Parties filing in this proceeding need not repeat views already contained in their previously submitted comments.

[20] We will use 10XXX, including any eventual expansion to 10XXXX, interchangeably with "equal access code." We seek comment on how any future expansion of the 10XXX code should affect our consideration of the issues raised herein.

[21] The Act requires that aggregators unblock "800" and "950" access. 47 U.S.C. § 226(c)(1)(B). We have proposed a rule based on this requirement in CC Docket No. 90-313. *See Further NPRM*, 6 FCC Rcd at 121, 128.

[22] We are currently considering whether a system of "billed party preference" is preferable to payphone presubscription. *See* Bell Atlantic Petition for Rulemaking to Establish Uniform Dialing Plan From Pay Telephones, RM-6723, filed April 13, 1989. If billed party preference were implemented, all operator service calls dialed without access codes from payphones would automatically be routed to the OSP presubscribed to the party to be billed for the call. Thus, billed party preference could likely obviate some of the call blocking problems underlying this Notice. This system, however, will not be technically feasible for at least three years. Therefore, even if we decide that billed party preference is a desirable long-term solution -- an issue we do not now reach -- an interim resolution of call blocking problems is necessary.

[23] 47 U.S.C. § 226(f). We have proposed a rule based on this requirement in CC Docket No. 90-313. *See Further NPRM*, 6 FCC Rcd at 121, 129.

[24] In the initial *NPRM*, we proposed that the call blocking prohibition apply to 10XXX-0+, but not 10XXX-1+, dialing. *NPRM*, 5 FCC Rcd at 463233, 4638 n.13, 4640 n.42.

[25] Although the issue of whether "correctional" facilities should be allowed to block all but 0+ and collect calls from inmate phones is implicated by the discussion here, the underlying issue of whether such facilities are aggregators will be addressed in CC Docket No. 90-313. The issue of whether U.S. governmental entities, such as military installations, and other institutions are "aggregators" under the Act will also be addressed in that proceeding.

[26] For example, interested parties have mentioned a number of network solutions, including originating line screening, billed number screening, and the selective blocking of international dialing.

[27] Our most recent information indicates that Bell Operating Company payphones have an average projected total life of 8 years, with the actual life of particular payphones varying between 2 and 12 years, and that most of these payphones now have a remaining life of approximately 5 years. We seek comment on how these figures compare to similar data regarding competitive public payphones. As we have no current data on PBXs, which were deregulated in the early 1980s, or other aggregator equipment, we seek comment on the average, actual, and remaining lives of such equipment.

[28] In non-equal access areas, which currently contain about 7% of the nation's telephone lines, 10XXX access is unavailable, and "0+" traffic defaults to AT&T.

[29] 47 C.F.R. § 226(e)(2) (emphasis added).

[30] The Operator Services Act only restricts aggregators to ensuring that "no charge by the aggregator to the consumer for using an '800' or '950' access code number, or any other access code number, is greater than the amount the aggregator charges for calls placed using the presubscribed provider of operator services." 47 U.S.C. § 226(c)(1)(C). While we cannot, under the Act, prescribe "advance payment by consumers" as payphone compensation, *id.* § 226(e)(2), we are under no statutory obligation to prohibit its collection by payphone owners.

[31] We tentatively conclude that any compensation that we might prescribe should be associated only with completed calls.

[32] We seek comment on whether it would be more efficient to require local exchange carriers (LECs) to submit such reports directly to the pool administrator.

[33] We note that this second alternative could work, as well, in a billed party preference environment.

[34] *See NPRM*, 5 FCC Rcd at 4636.

[35] *Cf.* Telecommunications Services for Hearing-Impaired and Speech-Impaired Individuals, and the Americans with Disabilities Act of 1990: Notice of Proposed Rule Making, 5 FCC Rcd 7187, 7190 (1990) (NECA or other industry organization proposed for implementation of cost recovery mechanism).

[36] *See* S. Rep. No. 101-439, 101st Cong., 2d Sess. 19 n.17 (1990) ("Independent, private, or competitive pay telephones refer to those payphones not owned or provided by the telephone companies."). We ask for comment on how any future change in the status of telephone company payphones, such as those owned by the Bell Operating Companies, would affect any compensation mechanism we might prescribe.

[37] H.R. Rep. No. 101-213, 101st Cong., 1st Sess. 2 (1989) ("The purpose of [the Act] is to protect telephone consumers against unfair prices and practices of some operator service providers (OSPs), yet allow the legitimate companies in the industry the opportunity to compete in the market.").

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 89-622

In the Matter of

Amendment of Parts 80 and 87
of the Commission's Rules to
modify and clarify the technical
characteristics of emergency
position indicating radiobeacons
and emergency locator transmitters
in the maritime and aviation
services.

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 5, 1991; Released: March 14, 1991

By the Commission:

I. INTRODUCTION

1. By *Notice of Proposed Rule Making* (*Notice*), PR Docket No. 89-622, 5 FCC Rcd 167 (1990), the Commission proposed to amend Parts 80 and 87 of the Commission's Rules, 47 C.F.R. Parts 80 and 87, to modify and clarify the technical characteristics of emergency position indicating radiobeacons (EPIRBs) and emergency locator transmitters (ELTs) that operate on 121.500 MHz and 243.000 MHz. This Report and Order adopts the rule amendments substantially as proposed.

II. BACKGROUND

2. EPIRBs and ELTs are small battery powered transmitters used to send a distress signal. EPIRBs are carried on ships while ELTs are carried on aircraft. They may be activated automatically or manually. The transmitted distress signal is identical for EPIRBs and ELTs. The distress signal is used both as an alarm to alert others that the ship or aircraft is in distress and as a beacon to aid search and rescue personnel to locate the vessel.

3. The distress signal may be received by overflying aircraft and nearby ship or land stations if they are monitoring the distress frequency and are within range of the EPIRB or ELT, or by low orbiting satellites that are part of the COSPAS-SARSAT system.[1] When received by the COSPAS-SARSAT satellite system the transmitted distress signal is retransmitted in its entirety to a ground station. The ground station measures the Doppler shift of the carrier frequency transmitted by the EPIRB or ELT, processes the Doppler shift using digital signal processing techniques in correlation with the satellite's position in orbit, and arrives at an approximate location of the EPIRB or ELT on the earth's surface.

4. The Radio Technical Commission for the Maritime Service (RTCM) filed a petition to modify and clarify the EPIRB rules.[2] The National Aeronautics and Space Administration (NASA), the National Transportation Safety Board (NTSB) and the United States Coast Guard filed comments supporting RTCM's petition.

III. DISCUSSION

5. In the *Notice* we proposed a number of changes aimed at improving EPIRB and ELT performance. [3] We proposed that all emissions of EPIRBs and ELTs operating on 121.500 MHz and 243.000 MHz must have a clearly defined carrier distinct from the modulation sidebands. More specifically, we proposed that on 121.500 MHz at least thirty percent of the total power emitted during any transmission cycle must be contained within plus or minus 30 Hertz. On 243.000 MHz, we proposed that at least thirty percent of the total power emitted during any transmission cycle must be contained within plus or minus 60 Hertz.[4] We also proposed to require that EPIRBs equipped with water activated batteries be able to float and that battery installation instructions be displayed on all EPIRB cases.

6. We also proposed a number of changes to clarify the rules and to reduce the burden of testing EPIRBs for type acceptance. For example, we proposed deleting reference to FAA documents TSO-C91a and DO-183 from Part 80, thus removing the requirement that EPIRBs have symmetric sidebands. We also proposed eliminating this requirement for ELTs operating on 121.500 MHz or 243.000 MHz.[5] Additionally, to reduce the burden of testing EPIRBs for type acceptance, we proposed that the reduced radiation level required for the class A EPIRB test switch be measured at 30 meters (98 feet) instead of the current 46 meters (151 feet) and be referenced as a power level instead of the current field strength.[6] We also proposed that Class A EPIRBs meet the technical requirements after free fall into water from 20 meters (67 feet) rather than the current 18 meters (59 feet) to be consistent with the Safety Convention requirements for drop tests of EPIRBs.[7] Further, we proposed rules for labeling so that maritime and aviation consumers can identify those EPIRBs and ELTs with carrier power characteristics that improve the likelihood that they can be detected by the COSPAS-SARSAT system. Finally, in a companion item to this rule making proceeding the Commission proposed a revised test procedure for type acceptance of EPIRBs.[8] Comments were filed by Halotech, Inc. (Halotech),[9] Lake Carrier's Association (Lake Carriers)[10] and RTCM. No reply comments were filed.

7. None of the commenters objected to our proposals to improve performance and clarify the rules regarding EPIRB and ELT operations. Further, because EPIRBs and ELTs are lifesaving devices used worldwide, it is vitally important that our rules permit them to operate as effectively as possible so that when the devices are activated, search and rescue teams will detect the distress signals and locate the ship or aircraft in distress. At the same time, it is also important that the EPIRB and ELT rules be clear and concise to eliminate any possible confusion. Therefore, for the reasons stated in the *Notice*,[11] we are adopting those rules substantially as proposed.

8. In the *Notice* we stated that an improperly installed battery can affect the floating ability and orientation of an EPIRB. Therefore, we proposed that the battery installa-

tion directions be displayed on the EPIRB case. Halotech pointed out that some units are designed for "Factory Only" battery installation and recommended that in these cases the Commission permit language such as, "For Battery Replacement Information refer to manual or contact [Company name and address]." We agree, and have modified our proposal accordingly. Under the new rules EPIRBs manufactured one year from the effective date of this order must display prominently on the outer case one of the following: the battery installation instructions, the title of the manual that contains such information, or the company name and address where the battery installation can be performed.

9. Additionally, in its comments, RTCM requests various editorial changes to the rules we proposed. It also contends that the current emission designator, A3N, associated with EPIRBs is not the best choice for describing the actual emissions and suggests modifying the rules to specify the emission with the designator A3X rather than with A3N. In support, it cites Section 2.201(e) of the Commission's Rules, 47 C.F.R. § 2.201(e), and Appendix 37A of the international Radio Regulations. We agree with RTCM that these minor editorial and non-substantive changes are appropriate and have amended the rules accordingly.

10. RTCM also contends that the spurious emission limit of approximately 50 dB below the carrier required for EPIRBs in Section 80.211 of the Commission's Rules, 47 C.F.R. § 80.211, is unduly restrictive and recommends that it be changed to 30 dB. We agree and note that the international Radio Regulations do not specify a limit for spurious emissions from EPIRBs.[12] No objections were filed to these RTCM requests and we have amended the rules to reflect the new limits.

11. Lake Carriers is concerned with the part of the proposed rule in Section 80.1053(e), 47 C.F.R. § 80.1053(e), that would require the battery manufacturer to mark permanently the month and year by which 50 percent of the battery's useful life will have expired. It contends that the major supplier of EPIRB batteries in Great Lakes, Bright Star, does not mark batteries in this manner and it has indicated unwillingness to do so. It argues, therefore, that no matter how desirable this requirement may appear, the Commission must consider whether manufacturers will comply with the battery date marking requirement.

12. In regard to Lake Carriers' concern, ships in the Great Lakes are required to carry Class C EPIRBs that operate on 156.750 MHz and 156.800 MHz. This proceeding governs EPIRBs that operate on 121.500 MHz and 243.000 MHz. We did not propose to require labeling of battery information in the *Notice* for Class C EPIRBs because Class C EPIRBs are already required to be equipped with a visual indication of a low battery condition.[13] Further, the 50 percent marking of the useful life of batteries is a longstanding requirement for EPIRBs that operate on 121.500 MHz and 243.000 MHz and is currently contained in Part 80 of the Rules.

13. Halotech recommends that emissions on 243.000 MHz should be optional, optional at a reduced power level, or deleted entirely. In support, Halotech notes it is difficult to design EPIRBs with antennas that radiate efficiently on two harmonically related frequencies, such as, 121.500 MHz and 243.000 MHz. Halotech claims that performance of all Class A, B, and S EPIRBs would improve greatly if they were to operate on the 121.500 MHz frequency only. Halotech also proposes that the rules adopted in Gen. Docket No. 89-623, note 7 *supra*, should specify that EPIRBs must radiate a minimum signal level on 121.500 MHz under a variety of test situations such as hand held, standing on a metal ground plane, or floating in water.

14. The Halotech proposal that all ELTs and Class A, B, and S EPIRBs should use the 121.500 MHz frequency only is beyond the scope of this proceeding. We point out, however, that Government search and rescue units providing assistance in non-Government distress situations are equipped with the 243.000 MHz frequency. Deleting the 243.000 MHz frequency from EPIRBs and ELTs would eliminate Government participation in non-Government search and rescue operations. Similarly, Halotech's proposal that the Commission's Report and Order in Gen. Docket No. 89-623, note 7 *supra*, require that EPIRBs radiate a minimum level of signal on 121.500 MHz when subjected to a variety of test situations is beyond the scope of this proceeding. This issue, however, will be considered in the Report and Order in Gen. Docket No. 89-623.

15. Finally, in a related matter to this proceeding, the National Oceanic and Atmospheric Administration (NOAA) notified the Commission that its address in paragraphs 80.1061(e) and (f) of the Rules, 47 C.F.R. § 80.1061(e) and (f), should be changed to read as follows:[14]

> NOAA/NESDIS, SARSAT Operations Division, E/SP3,
> Federal Building 4, Washington, D.C. 20233

The rules we adopt contain the new NOAA address.

IV. PAPERWORK REDUCTION ACT STATEMENT

16. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection or record keeping, labeling, disclosure, or record retention requirements, and will not increase or decrease the burden hours imposed on the public.

V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), that Parts 80 and 87 of the Commission's Rules ARE AMENDED as set forth in the Appendix below.

18. IT IS FURTHER ORDERED that this Report and Order will be effective on **April 25, 1991.**

19. IT IS FURTHER ORDERED that a copy of this Report and Order shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

20. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Parts 80 and 87 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

A. Part 80 - STATIONS IN THE MARITIME SERVICES.

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.205(a), the table under *Class of emission* and *Emission designator* is amended by removing A3N[3] and 3K20A3N and adding in their places respectively A3X[3] and 3K20A3X.

3. Section 80.207(d), the table under *Classes of emission* is amended by removing A3E, A3N, NON, adjacent to the frequencies 121.500 MHz and 243.000 MHz and adding in its place A3E, A3X, NON.

4. Section 80.211 is amended by redesignating paragraph (e) as (g) and adding a new paragraph (e) to read as follows:

§ 80.211 Emission limitations.

* * * * *

(e) The mean power of EPIRBs operating on 121.500 MHz, 243.000 MHz and 406.025 MHz must be as follows:

(1) On any frequency removed from the assigned frequency by more than 50 percent, up to and including 100 percent of the authorized bandwidth: at least 25 dB;

(2) On any frequency removed from the assigned frequency by more than 100 percent: at least 30 dB.

* * * * *

5. Section 80.223 is amended by revising paragraph (d) to read as follows:

§ 80.223 Special requirements for survival craft stations.

* * * * *

(d) Any EPIRB carried as part of a survival craft station must comply with the specific technical and performance requirements for its class contained in Subpart V of this Chapter.

6. Section 80.355 is amended by revising paragraph (d)(2) to read as follows:

§ 80.355 Distress, urgency, safety, call and reply Morse code frequencies.

* * * * *

(d) * * *

(2) EPIRB stations may be assigned 121.500 MHz and 243.000 MHz using A3E, A3X and NON emission or 156.750 MHz and 156.800 MHz using G3N emission to aid search and rescue operations. *See* Subpart V of this part.

7. Section 80.1053 is amended by revising paragraphs (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), (a)(12), (b)(3), (c), and (e) to read as follows:

§ 80.1053 Special requirements for Class A EPIRB stations.

(a) * * *

(4) Use A3X emission on a mandatory basis and A3E and NON emissions on an optional basis on the frequencies 121.500 MHz and 243.000 MHz;

(5) Transmission of A3E or NON emission must not exceed 90 seconds and must be followed by a transmission of at least three minutes of A3X emission; each transmission of a synthesized and/or prerecorded voice message must be preceded by the words "this is a recording";

(6) The effective radiated power must not be less than 75 milliwatts after 48 hours of continuous operation and without replacement or recharge of batteries.

(7) The mandatory A3X emission must be amplitude modulated with an audio signal swept downward between 1600 and 300 Hz. The sweeping range of the audio signal must be 700 Hz or greater. Its sweep repetition rate must be between 2 and 4 times per second. The modulation factor must be at least 0.85 and the modulation duty cycle must be at least 33%, but not more than 55%.

(8) EPIRBs manufactured on or after October 1, 1988; EPIRBs carried as part of a ship station to satisfy USCG equipment carriage requirements that are newly installed on or after April 1, 1989; EPIRBs carried as part of a ship station to satisfy USCG equipment carriage requirements on or after August 1, 1991; and EPIRBs that are newly installed as part of a voluntarily equipped ship station after August 1, 1991, must have a clearly defined carrier frequency distinct from the modulation sidebands for the mandatory emission, A3X, and if used, the A3E or NON emissions. On 121.500 MHz at least thirty per cent of the total power emitted during any transmission cycle with or without modulation must be contained within plus or minus 30 Hz of the carrier frequency. On 243.000 MHz at least thirty per cent of the total power emitted during any transmission cycle with or without modulation must be contained within plus or minus 60 Hz of the carrier frequency. Additionally, if the type of emission is changed during transmission the carrier frequency must not shift more than plus or minus 30 Hz on 121.500 MHz and not more than plus or

minus 60 Hz on 243.000 MHz. The long term stability of the carrier frequency must comply with the requirements in section 80.209(a).

* * * * *

(12) Meet the requirements of paragraphs (a)(1) through (9) of this section after a free fall into water 3 times from a height of 20 meters (66 ft.);

* * * * *

(b) * * *

(3) Reduce radiation to a level not to exceed 100 nanowatts at a distance of 30 meters (98 feet) irrespective of direction.

(c) EPIRBs manufactured on or after October 1, 1988, must be tested in accordance with Subpart N, Part 2 of this Chapter. A report of the measurements must be submitted with each application for type acceptance. EPIRBs that meet the output power characteristics of this section must have a permanent label prominently displayed on the outer casing stating, "Meets FCC Rules for improved satellite detection." This label, however, must not be placed on the equipment without authorization to do so by the Commission. Application for such authorization may be made either by submission of a new application for type acceptance accompanied by the required fee and all information and test data required by Parts 2 and 80 of this Chapter or, for EPIRBs type accepted prior to October 1, 1988, an application for modification accompanied by the required fee requesting such authorization, including appropriate test data and a showing that all units produced under the original type acceptance authorization comply with the requirements of this paragraph without change to the original circuitry. If the intent is simply to add the proper label to an already approved and compliant EPIRB, a letter of notification prior to implementing the labeling requirements will be needed. This letter request should be sent to the attention of the Authorization and Evaluation Division, 7435 Oakland Mills Road, Columbus, Maryland 21046, attention EAB. The modulation, power and frequency stability requirements specified in paragraphs (a)(6), (a)(7) and (a)(8) of this section must be met under the environmental test conditions specified in Subpart N, Part 2 of this Chapter.

(d) * * *

(e) EPIRBs must be powered by a battery contained within the transmitter case or in a battery holder that is rigidly attached to the transmitter case. The battery connector must be corrosion resistant and positive in action and must not rely for contact upon spring force alone. The useful life of the battery is the length of time that the battery can be stored under marine environmental conditions without the EPIRB transmitter peak effective radiated power falling below 75 milliwatts prior to 48 hours of continuous operation. The month and year of the battery's manufacture must be permanently marked on the battery and the month and year upon which 50 percent of its useful life will have expired must be permanently marked on both the battery and the outside of the transmitter. The batteries must be replaced if 50 percent of their useful life has expired or if the transmitter has been used in an emergency situation. EPIRBs manufactured after *(one year from the effective date of this order)* must display prominently on the outer case one of the following: the battery installation instructions, the title of the manual that contains such information, or the company name and address where the battery installation can be performed.

* * * * *

8. Section 80.1055 is amended by revising paragraph (a)(3) to read as follows:

§ 80.1055 Special requirements for Class B EPIRB stations.

(a) * * *

(3) Meet the requirements in § 80.1053(a)(4) through (8), (a)(14), and (c) through (i). EPIRBs with water activated batteries must, additionally, meet the requirements contained in § 80.1053(a)(10) and (a)(11);

* * * * *

9. Section 80.1059 is amended by revising paragraphs (d)(3) and (d)(4) to read as follows:

§ 80.1059 Special requirements for Class S EPIRB stations.

* * * * *

(d) * * *

(3) Meet the requirements in § 80.1053 (a)(4) through (a)(8) and (b) through (i);

(4) Class S EPIRBs may provide either continuous or intermittent operation. If the EPIRB is designed for intermittent operation, the duty cycle must be from 50 to 60 per cent and the period two minutes plus or minus 12 seconds. In either event, the EPIRB must meet the power output characteristics described in § 80.1053(a)(8);

* * * * *

10. Section 80.1061 is amended by replacing in paragraphs (e) and (f) the NOAA address from "NOAA, NESDIS, USMCC Data Base Manager, Federal Building 4, Washington DC 20233" to "NOAA/NESDIS, SARSAT Operations Division, E/SP3, Federal Building 4, Washington, D.C. 20233" and by revising paragraph (b) to read as follows:

§ 80.1061 Special requirements for 406.025 MHz EPIRBs.

* * * * *

(b) The 406.025 MHz EPIRB must contain as an integral part a "homing" beacon operating only on 121.500 MHz that meets all the requirements described in the RTCM Recommended Standards document described in paragraph (a) of this section. The 121.500 MHz "homing" beacon must have a continuous duty cycle that may be interrupted during the transmission of the 406.025 MHz signal only. Additionally, at least 30 per cent of the total power emitted during any transmission cycle must be contained within plus or minus 30 Hz of the carrier frequency.

* * * * *

B. Part 87 - AVIATION SERVICES

1. The authority citation for Part 87 continues to read as follows:

AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-156, 301-609.

2. Section 87.137(a) the table under *Class of emission* and *Emission designator* are amended by removing A3N[4] and 3K20A3N and adding in their place respectively A3X[4] and 3K20A3X.

3. Section 87.139 is amended by revising paragraph (a) introductory text and adding paragraph (h) to read as follows:

§ 87.139 Emission limitations.

(a) Except for ELTs and when using single sideband (R3E, H3E, J3E), or frequency modulation (F9) or digital modulation (F9Y) for telemetry or telecommand in the frequency bands 1435-1535 MHz and 2310-2390 MHz, the mean power of any emissions must be attenuated below the mean power of the transmitters (pY) as follows:

* * * * *

(h) For ELTs operating on 121.500 MHz and 243.000 MHz the mean power of any emission must be attenuated below the mean power of the transmitter (pY) as follows:

(1) When the frequency is removed from the assigned frequency by more than 50 percent up to and including 100 percent of the authorized bandwidth the attenuation must be at least 25 dB;

(2) When the frequency is removed from the assigned frequency by more than 100 percent of the authorized bandwidth the attenuation must be at least 30 dB.

4. Section 87.141 is amended by revising paragraphs (g), (h) and (i) to read as follows:

§ 87.141 Modulation requirements.

* * * * *

(g) Except that symmetric sidebands are not required, the modulation characteristics for ELTs must be in accordance with the specifications contained in the Federal Aviation Administration (FAA) Technical Standard Order (TSO) Document TSO-C91a titled "Emergency Locator Transmitter (ELT) Equipment" dated April 29, 1985. TSO-C91a is incorporated by reference in accordance with 5 U.S.C. 552(a). TSO-C91a may be obtained from the Department of Transportation, Federal Aviation Administration, Office of Airworthiness, 800 Independence Avenue S.W., Washington, DC 20591.

(h) ELTs must use A3X emission and may use A3E or N0N emissions on an optional basis while transmitting. Each transmission of a synthesized or recorded voice message from an ELT must be preceded by the words "this is a recording"; transmission of A3E or N0N emission must not exceed 90 seconds; and any transmission of A3E or N0N emissions must be followed by at least three minutes of A3X emission.

(i) ELTs manufactured on or after October 1, 1988, must have a clearly defined carrier frequency distinct from the modulation sidebands for the mandatory emission, A3X, and, if used, the A3E or N0N emissions. On 121.500 MHz at least thirty per cent of the total power emitted during any transmission cycle with or without modulation must be contained within plus or minus 30 Hz of the carrier frequency. On 243.000 MHz at least thirty per cent of the total power emitted during any transmission cycle with or without modulation must be contained within plus or minus 60 Hz of the carrier frequency. Additionally, if the type of emission is changed during transmission, the carrier frequency must not shift more than plus or minus 30 Hz on 121.500 MHz and not more than plus or minus 60 Hz on 243.000 MHz. The long term stability of the carrier frequency must comply with the requirements in § 87.133.

5. In Section 87.147, paragraph (b) and (c) are redesignated as paragraphs (c) and (d), and a new paragraph (b) is added to read as follows:

§ 87.147 Type acceptance of equipment.

* * * * *

(b) ELTs manufactured after October 1, 1988, must meet the output power characteristics contained in paragraph 87.141(i) of this section when tested in accordance with the Signal Enhancement Test contained in Subpart N, Part 2 of this Chapter. A report of the measurements must be submitted with each application for type acceptance. ELTs that meet the output power characteristics of this section must have a permanent label prominently displayed on the outer casing stating, "Meets FCC Rules for improved satellite detection." This label, however, must not be placed on the equipment without authorization to do so by the Commission. Application for such authorization may be made either by submission of a new application for type acceptance accompanied by the required fee and all information and test data required by Parts 2 and 87 of this Chapter or, for ELTs type accepted prior to October 1, 1988, a letter requesting such authorization, including appropriate test data and a showing that all units produced under the original type acceptance authorization comply with the requirements of this paragraph without change to the original circuitry.

* * * * *

6. Section 87.187 is amended by revising paragraph (k) to read as follows:

§ 87.187 Frequencies.

* * * * *

(k) The frequencies 121.500 MHz and 243.000 MHz are emergency and distress frequencies available for use by survival craft stations, emergency locator transmitters and equipment used for survival purposes. Use of 121.500 MHz and 243.000 MHz shall be limited to transmission of signals and communications for survival purposes. Types A2A, A3E or A3N emission may be employed, except in the case of emergency locator transmitters where A3E, A3X and NON are permitted.

* * * * *

7. Section 87.195 paragraphs (a) and (b) are revised by removing A3N and substituting in its place A3X.

FOOTNOTES

[1] SARSAT stands for search and rescue satellite-aided tracking. COSPAS is an acronym for a Russian phrase meaning space system for search of distressed vessels.

[2] *See Notice* at paras. 5 through 7.

[3] *See Notice* at para. 11.

[4] *See Notice* at paras. 11 through 13.

[5] NASA and the U.S. Coast Guard supported this change and noted that the symmetric side bands did not contribute to improved detection by the COSPAS-SARSAT satellites for EPIRBs and ELTs.

[6] *See* Section 80.1053(b)(3) of the Commission's Rules, 47 C.F.R. § 80.1053(b)(3).

[7] The International Convention for the Safety of Life at Sea, 1974, T.I.A.S. 9700, Safety Convention, specifies, among other things, requirements for EPIRBs, including drop tests.

[8] *See* Notice of Proposed Rule Making, GEN. Docket No. 89-623, 5 FCC Rcd 345 (1990).

[9] Halotech is an entity providing consulting services to manufacturers and users of EPIRBs.

[10] The Lake Carrier's Association is an organization that represents 14 United States-flag Great Lakes fleets. Its members have 65 vessels that comprise 98 percent of the tonnage of all United States Great Lakes vessels and approximately 18 percent of all United States self-propelled vessels of 1,000 gross registered tons or larger engaged in the domestic trade.

[11] *See Notice* at paras. 11 through 18.

[12] *See* international Radio Regulations Appendix 8.

[13] *See* Section 80.1057(r) of the Commission's Rules, 47 C.F.R. § 80.1057(r).

[14] Paragraphs 80.1061(e) and (f) of the Rules require that manufacturers of 406.025 MHz EPIRBs program each EPIRB with a unique identification code provided by NOAA upon request. To enhance protection of life and property, these rules also request owners to register such EPIRBs by providing to NOAA the EPIRB identification code, the owner's name, address, telephone number and type of ship.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 89-623

In the matter of

Procedure for testing Class A, B and S emergency position indicating radiobeacons (EPIRBs) RM-6578

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 5, 1991; Released: March 14, 1991

By the Commission:

INTRODUCTION

1. By this action, the Commission amends Part 2 of its Rules to add a new procedure for testing Class A, B and S Emergency Position Indicating Radiobeacons (EPIRBs) operating under Part 80 of the its Rules. The new procedure, entitled "FCC Procedure for Testing Class A, B and S Emergency Position Indicating Radiobeacons (EPIRBs)," provides a formal, step by step method for testing these devices for compliance with the technical standards in Part 80. This procedure simplifies, clarifies and updates the existing EPIRB measurement procedures. It will provide a more efficient and effective method for testing these devices and thereby benefit both the Commission and EPIRB manufacturers.

BACKGROUND

2. An EPIRB is a small, battery powered transmitter carried on maritime vessels to provide radiolocation signals in the event of an accident at sea. EPIRB signals assist search and rescue units in locating stricken vessels and survivors. Class A, B and S EPIRBs operate on the distress frequencies 121.5 and 243 MHz. Part 80 of the rules sets forth technical, operational and environmental requirements for these EPIRBs. Class A EPIRBs are designed to float free of a vessel and activate automatically. Class B EPIRBs may be activated manually or automatically, but are not required to float. Class S EPIRBs may either float free or provide a means of attachment to a survival craft, and must be activated manually. All EPIRBs must be type accepted under the procedures in Part 2 of the Rules which require a showing of compliance with the technical, operational and environmental requirements of Part 80 of the Rules. EPIRBs are currently tested according to the procedures in Bulletin OET-45, "Measurement Procedures for Peak Effective Radiated Power (PERP) of Emergency Position Indicating Radio Beacon (EPIRB) Transmitters" and Radio Technical Commission for Aeronautics (RTCA) Document DO-183, "Minimum Operational Performance Standards for Emergency Locator Transmitters".

3. In 1988, the FCC Laboratory, in conjunction with the U.S. Coast Guard, conducted an investigation of Class A, B and S EPIRBs.[1] Samples of most of the EPIRBs available on the market were obtained and tested by the FCC Laboratory for compliance with the requirements of Part 80 of the Rules. The Coast Guard performed certain mechanical and environmental tests, including water leakage, on some models. This investigation revealed a high rate of non-compliance for both the electrical and environmental tests.

4. On October 1, 1988, new FCC technical standards designed to enhance the spectral characteristics of the signals transmitted by Class A, B and S EPIRBs became effective.[2] This "spectral enhancement" for Class A, B and S EPIRBs, which is set forth in Section 80.1053(a)(8) of our rules, is intended to increase the probability of detection by satellites.[3] In the *Report and Order* adopting the new technical standards, the Commission indicated that a test procedure for determining compliance with the spectral enhancement requirement would be developed.[4]

5. The Commission determined that in order to improve the compliance rate of these important safety devices and to provide the spectral enhancement test procedure, a comprehensive test procedure which would unify, clarify and update the existing procedures was necessary. Accordingly, on December 20, 1989, the Commission adopted a *Notice of Proposed Rule Making* (*NPRM*) proposing to amend the rules by adding a new test procedure for EPIRBs.[5] This proposal also included EPIRB measurement issues raised in a Petition for Rulemaking (RM-6578) filed by the Radio Technical Commission for Maritime Services.[6] Three parties, Halotech Inc., Modern Products Ltd. and Radio Technical Commission for Maritime Services (RTCM) filed comments in this proceeding. There were no reply comments filed. The commenting parties support the new test procedure, but offer some suggestions for modifications. The comments and our decisions are discussed below.

DISCUSSION

6. The new EPIRB test procedure simplifies, clarifies and updates the test procedures currently used for determining whether Class A, B and S EPIRBs comply with our technical rules. It combines the existing FCC and RTCA test procedures to provide a single document that sets forth methods for performing all of the required tests. In addition, the new test procedure includes instructions for determining compliance with the new spectral enhancement requirements. It provides step by step instructions for performing all of the measurements required for type acceptance. This will help to simplify the measurements. Further, the new procedure clarifies the test requirements, thereby providing a uniform method for determining compliance. We believe that adoption of this new test procedure will be beneficial to our administrative procedures and also to both the manufacturers and users of EPIRBs by reducing the uncertainty associated with the existing compliance testing procedures and providing more efficient and effective test methods. As discussed below, the test procedure incorporates a number of suggestions from the commenting parties. In order to make this procedure more available to the public and to make clear that it is an enforceable element of our regulations, we are incorporating it into our rules.

7. Modern Products recommends a number of changes to the proposed test procedures. It argues that the forty-eight hour operational test needs to only be performed at 0^0 C rather than the proposed -20^0 C. According to Modern Products, the ambient temperature in a marine environment would not be below 0^0 C. Modern Products also recommends that during this environmental test the antenna be replaced with an appropriate non-radiating load. It contends that this is necessary to avoid increased power consumption by the unit under test due to the loading effect of the metal construction typical of environmental test chambers. We disagree with Modern Products' position on these points. The minimum operating temperature for Class A, B and S EPIRBs is specified in Part 2 and Part 80 of the Rules at -20^0 C. Also, RTCM standards for 406 MHz EPIRBs call for operation at -20^0 C.[7] We observe that the air temperature in marine environments does fall below 0^0 C in many areas. Accordingly, we are retaining the -20^0 C test requirement. We also observe that the proposed test procedure already permits substitution of a non-radiating load for the antenna. Of course, the substitute must present the equivalent load as the standard antenna so as not to reduce the battery current drain. A detailed description of the substitute antenna and its performance is to be included in the type acceptance application.

8. The proposal calls for EPIRBs to be tested for peak effective radiated power (PERP) on an open field test site with the equipment located on a metal ground plane. Modern Products recommends that EPIRBs be tested in a manner that simulates actual operating conditions. According to Modern Products, floating EPIRBs should instead be inserted into a hole in the metal ground plane up to a point that would coincide with the normal water line on the device. It states that this method would yield higher readings of PERP. It points out that this method is used by the Department of Communications in Canada. We find that tests performed at the Commission's Laboratory show only a small difference in measured PERP when the unit was inserted into the metal ground plane. In most cases the PERP was lower. We believe that the method suggested by Modern Products introduces unnecessary complications into the testing process, such as determining the float level and preparing a customfit ground plane for each piece of equipment. Moreover, we are cognizant that even EPIRBs intended primarily to be used in a floating position are often operated out of the water. We believe the proposed approach of situating the equipment on the ground plane will yield the most consistent results and is reasonably representative of the conditions of actual use. Accordingly, the new test procedure will require that PERP measurements of all EPIRBs be made with the unit placed on a ground plane.

9. The proposed test procedure calls for thermal shock, drop, and stability and buoyancy tests only for EPIRBs that are required to float. Halotech recommends that these tests also be required for any EPIRB that is intended or designed to float, with or without an accessory flotation device. We agree with Halotech that it is appropriate to perform these tests on all EPIRBs that are intended for floating operation. In the case of EPIRBs not required to float (i.e. Class B and some Class S units), determinations regarding whether a unit is intended to float will be made based on statements made by the manufacturer or included in product information materials. We have revised the test procedure accordingly.

10. Halotech also questions the requirement to perform the vibration test with the unit attached to the vibration table by the mounting bracket. Moreover, according to Halotech, even if a bracket is supplied the bracket should not be included in the tests. Halotech also objects to the requirement to mount the EPIRB in one position for all the vibration tests because this would require vibration equipment that can produce simultaneous vibrations in all three axes. Halotech asserts that many test laboratories do not have such equipment. Based upon our observations, we find that Halotech is correct on these points and have incorporated appropriate revisions into the procedure we are adopting.

11. The proposed procedure specifies use of a storage oscilloscope for measuring modulation characteristics. Halotech asserts that these measurements can be accomplished with other instruments. RTCM also raises the possibility of using alternative instruments, such as a logic analyzer, for this test. We recognize the desirability of permitting alternative instruments to be used. We will accept measurement results obtained using other instruments, provided the method used yields results equivalent to that obtained with the method specified in the test procedure. In cases of dispute, we will employ the storage oscilloscope as the instrument of reference.

12. RTCM recommends that frequency stabilty be measured over the temperature range -20^0 to $+55^0$ C rather than -20^0 to $+50^0$ C as called for in the general requirments in Part 2 of the Rules. They state that -20^0 to $+55^0$ C is the internationally accepted operating range for EPIRBs and it is therange specified in Part 80 of the Rules for Class A, B and S EPIRBs. We believe this recommendation has merit and are making this change.

13. In the *NPRM* the Commission requested comments on two different proposed methods for determining compliance with the spectral enhancement requirements. RTCM recommends that since Method 1 is applicable only to EPIRBs that have clearly defined sidebands and Method 2 is applicable to all EPIRBs and provides measurements that are within about 5% of the accuracy of Method 1, only Method 2 should be included in the test procedure. We accept RTCM's recommendation to include only Method 2 in the test procedure.

14. RTCM notes that a humidity test is not included in the proposed procedure. It states that such a test is desirable to ensure that the equipment continues to operate even after exposure to humid conditions. RTCM notes that it has included such a test in the RTCM standard for 406 MHz EPIRBs. A humidity test was not proposed in the *NPRM* and would, in effect, establish a new technical standard not discussed in the *NPRM*. Therefore, RTCM's proposed humidity test is beyond the scope of this proceeding and is not being incorporated in the new test procedure.

15. RTCM points out that Class B EPIRBs are not required to have an RF power indicator and, therefore, the steps in the proposed test procedure that refer to a power indicator must be revised. We concur with RTCM. Since the *Report and Order* in PR Docket No. 89-622 does not extend the power indicator requirement to Class B EPIRBs, we have added the option of using a receiver to verify operation at the conclusion of certain tests as appropriate.

16. RTCM contends that the Part 80 requirement for spurious emission suppression is unnecessarily stringent. This issue has been addressed in the *Report and Order* in PR Docket No. 89-622.

17. The proposed procedure requires modulation characteristics tests at both 121.5 and 243 MHz. RTCM believes that the additional tests at 243 MHz are unnecessary and should be deleted. We disagree. Our experience has shown that there can be significant differences in the modulation characteristics at the two frequencies. Therefore, we are retaining the tests at both frequencies.

18. RTCM recommends that the name of the "Automatic Release Mechanism and Activation Tests for Class A EPIRBs" be changed to "Float Free and Activation Test" and that the requirement for repeating this test for different rotations of the mounting fixture be deleted. We agree that the suggested name for this test is more appropriate and defer to RTCM's expertise and judgment that the repetitions of the test called for in the proposed procedure are not necessary. Accordingly, the title and procedure have been changed as requested by RTCM.

19. For the stability and buoyancy test, RTCM recommends that the procedure specify that the test be performed in fresh water and that the requirement for repeating this test for every 45 degrees of rotation of the EPIRB also be deleted. Since fresh water is less buoyant than salt water, we agree that fresh water should be specified and, again, we defer to RTCM on the necessity of repeating the test and are deleting this requirement.

20. In a companion item to this proceeding, the Commission is requiring that newly manufactured EPIRBs meet the requirements of this new test procedure prior to a grant of type acceptance.[8] The effective date for use of this test procedure will be as specified in the rules adopted in the *Report and Order* in PR Docket No. 89-622.

FINAL REGULATORY FLEXIBILITY ANALYSIS

21. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

In the course of testing EPIRBs, the Commission's Laboratory found a significant percentage of units to be noncompliant with the technical requirements in the Rules. Development of a comprehensive test procedure is necessary in order to provide more specific information on how the devices are to be tested for type acceptance. Also, it is necessary to amend the EPIRB test procedures to provide for testing of such devices for compliance with certain recent changes to the rules. Finally, it is necessary to include the test procedure into the Rules to make the test procedure more generally available to the public and to clarify that this procedure has the full force of our regulations.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

No commentors responded to issues raised in the Initial Regulatory Flexibility Analysis.

III. Significant alternatives:

The Commission considered all of the alternatives proposed in the *NPRM* and all timely filed comments directed to the various issues in the *NPRM*. The only significant alternative available to the Commission would be to maintain the status quo and not adopt these rules. However, this would leave the industry with no clear, comprehensive document to refer to when performing type acceptance testing of EPIRBs.

ORDERING CLAUSE

22. Accordingly, IT IS ORDERED that under the authority contained in Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, Part 2 of the Rules IS AMENDED as set forth in Appendix A below. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 2 of Chapter I, Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 2 continues to read as follows:

Authority: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, and 307 unless otherwise noted.

2. Section 2.995 is amended by revising paragraph (2) to read as follows:

Section 2.995 Measurements required: Frequency stability.

* * * * *

(2) From -20^0 to $+50^0$ centigrade for equipment to be licensed for use in the Maritime Services under Part 80 of this chapter, except for Class A, B and S Emergency Position Indicating Radiobeacons (EPIRBS), and equipment to be licensed for use above 952 MHz at operational fixed stations in all services, stations in the Local Television Transmission Service and Point-to-Point Microwave Radio Service under Part 21, and equipment licensed for use aboard aircraft in the Aviation Services under Part 87 of this chapter.

3. A new Subpart N is added to read as follows:

Subpart N--FCC Procedure for Testing Class A, B and S Emergency Position Indicating Radiobeacons (EPIRBS)

TABLE OF CONTENTS

GENERAL

Section 2.1501 *INTRODUCTION*

Section 2.1503 *TEST ENVIRONMENT*

Section 2.1505 *TEST INSTRUMENTATION AND EQUIPMENT*

ENVIRONMENTAL AND OPERATIONAL TEST PROCEDURES

Section 2.1507 *TEST FREQUENCIES*

Section 2.1509 *ENVIRONMENTAL AND DURATION TESTS*

Section 2.1511 *MEASUREMENTS OF RADIATED EMISSIONS*

Section 2.1513 *MEASUREMENTS OF MODULATION CHARACTERISTICS*

Section 2.1515 *SPECTRAL MEASUREMENTS*

DATA RECORDING/REPORTING REQUIREMENTS

Section 2.1517 *DATA RECORDING/REPORTING REQUIREMENTS*

Figures

Figure 1 - Measurement Site

Figure 2 - Typical Audio Waveform

Figure 3 - Example of ideal EPIRB Spectrum

Figure 4 - Example of EPIRB Carrier Component

GENERAL

Section 2.1501 *INTRODUCTION*

The procedure described herein sets forth uniform methods for testing Class A, B and S Emergency Position Indicating Radiobeacons (EPIRBs) for compliance with the applicable portions of the FCC Rules and Regulations. Other methods and test results may be used provided they are fully documented and deemed by the Commission to yield results equivalent to the procedures set forth in this section.

Section 2.1503 *TEST ENVIRONMENT*

(a) *Measurement Sites*

Radiated emission tests for peak effective radiated power (PERP), spurious emissions and power in the test mode are to be performed on an open field test site as shown in Figure 1. The site is to be located on level ground with an obstruction-free, 60 m by 52 m, elliptical area. The site is to be equipped with an antenna mast capable of adjustment from 1 to 4 m. The center of a metal ground plane at least one wavelength in diameter at 121.5 MHz (2.47 m) is to be located 30 m from the receiving antenna. The ground plane is to have provisions for mounting removable quarter-wave vertical elements to produce a monopole antenna at both 121.5 and 243 MHz with a VSWR of less than 1.5.

NOTE: It is desirable that the level of radiated ambient EME at the test site be at least 6 dB below the FCC limits applicable to the EPIRB. It is, of course, not always possible to meet this condition. If the ambient field strength at some frequencies within the specified measurement ranges is too high, it is recommended that one or more of the following corrective steps be employed:

1) Perform measurements in critical frequency bands during hours when broadcast and other radio stations are off-the-air and ambients from industrial equipment are lower.

2) Insofar as is possible, orient the axis of an open area test site to discriminate against strong ambient signals.

3) Vary the bandwidth of the measuring instrument to separate ambient EME from emissions from the EPIRB.

(b) *Temperature*

Except as otherwise noted, the ambient temperature during testing is to be within the range of 4 to 35^{0}C (40 to 95^{0}F).

Section 2.1505 *TEST INSTRUMENTATION AND EQUIPMENT*

(a) *Receiver (Field Intensity Meter)*

A calibrated field intensity meter (FIM) with a frequency range of 30 to 1000 MHz is required for measuring radiated emission levels. This instrument should be capable of making peak measurements with a bandwidth of 100 kHz.

(b) *Spectrum Analyzer*

Spectral measurements are to be made with a spectrum analyzer with a minimum resolution bandwidth no greater than 10 Hz. The video filter, if used, should have a bandwidth wide enough so as to not affect peak readings. A linear video output is desirable for performing measurements of modulation characteristics.

(c) *Storage Oscilloscope*

Measurements of modulation characteristics are to be made using a calibrated storage oscilloscope. This instrument is to be DC coupled and capable of manually triggered single sweeps.

(d) *Frequency Counter*

A frequency counter with an accuracy of at least 5 parts per million is required for measuring the carrier frequency.

(e) *Signal Generator*

A calibrated signal generator with an output of at least 75 mW at 121.5 and 243 MHz is required for generating a reference signal for site calibration.

(f) *Antenna*

Radiated emissions are to be measured with calibrated, tuned, half-wave dipole antennas covering the frequency range of 30 to 1000 MHz.

(g) *Temperature Chamber*

Tests which call for subjecting the EPIRB to temperature levels other than the ambient temperature are to be performed in a temperature test chamber which can be adjusted to stable temperatures from -20 to $+55^0$C. This chamber is to be of sufficient size to accommodate the EPIRB under test.

(h) *Vibration Table*

A vibration table capable of vibrating the EPIRB with a sinusoidal motion is required. The table must be capable of varying the frequency of vibration either linearly or logarithmically over a range of 4 to 33 Hz with maximum peak amplitudes of up to 2.5 mm.

(i) *Salt Fog Chamber*

A chamber capable of producing salt fog at a temperature of 35^0C for 48 hours is required. This chamber is to be of sufficient size to accommodate the EPIRB under test.

(j) *Drop Test Facility*

A facility which will permit dropping an EPIRB from a height of 20 m into water is required. The water must be deep enough so that the EPIRB will not touch bottom when dropped.

ENVIRONMENTAL AND OPERATIONAL TEST PROCEDURES

Section 2.1507 *TEST FREQUENCIES*

Testing of an EPIRB for compliance outside a shielded room on a distress frequency is prohibited, since this may interfere with emergency communications. Therefore, all compliance testing outside a shielded room should be conducted on one of the pairs of alternate frequencies specified below:

121.600/243.200 MHz
121.650/243.300 MHz
121.700/243.400 MHz
121.750/243.500 MHz
121.800/243.600 MHz
121.850/243.700 MHz
121.900/243.800 MHz

The above frequencies are to be used for limited testing of EPIRBs for compliance with FCC Rules, subject to the following conditions:

1)The testing shall not cause harmful interference to authorized communications on these frequencies.

2)The testing shall be coordinated with the nearest FCC district office.

For simplicity, 121.5 MHz and 243 MHz will be used throughout this test procedure to indicate the alternate test frequency.

Section 2.1509 *ENVIRONMENTAL AND DURATION TESTS*

The environmental and operational tests in Sections 2.1509(a) through (e) are to be conducted on a single test unit in the order given below. This sequence of tests also includes the electrical tests in Sections 2.1511, 2.1513 and 2.1515. The test unit is not to be adjusted, nor is the battery to be replaced during these tests, and a log of battery on-time should be maintained. The above tests are to be performed on the same test unit. The tests in Sections 2.1509(f) through (i) may be run in any sequence or may be performed on separate test units.

(a) *Vibration Test*

Step 1)

Secure the EPIRB to the vibration table. The EPIRB is not to be operated and should not activate while being vibrated.

Step 2)

Subject the EPIRB to sinusoidal motion parallel to one of the three major orthogonal axes under the following conditions:

A. Frequency (Hz)	Peak Amplitude (mm)
4-10	2.5
10-15	0.8
15-25	0.4
25-33	0.2

B. The frequency is to be changed either linearly or logarithmically with time between 4 Hz and 33 Hz such that a complete cycle (4 Hz to 33 Hz to 4 Hz) takes approximately 5 minutes.

C. The EPIRB is to be vibrated for at least 30 minutes or six complete cycles.

Step 3)

Remount the EPIRB, if necessary, and repeat step 2 for each of the other two major orthogonal axes.

Step 4)

Upon completion of the test, perform an exterior mechanical inspection and verify operation by turning the unit on and observing the RF power indicator on the unit or monitoring the transmission with a receiver. Record test results.

(b) *Thermal Shock Tests*

These tests are to be performed on EPIRBs which are required or intended to float.

(1) *Low Temperature Thermal Shock Test*

Step 1)

Place the EPIRB in a temperature chamber for at least 3 hours at -20^0C or colder. The EPIRB is not to be operated while being cooled.

Step 2)

Immediately place the EPIRB in water that has been maintained at $+10^0$C or warmer.

Step 3)

After 15 minutes, perform an exterior mechanical inspection and verify operation by turning the unit on and observing the RF power indicator on the unit or monitoring the transmission with a receiver. Record test results.

(2) *High Temperature Thermal Shock Test*

Step 1)

Place the EPIRB in a temperature chamber for at least 3 hours at +55 degrees C or warmer. The EPIRB is not to be operated while being heated.

Step 2)

Immediately float the EPIRB in water that is maintained at +25 degrees C or colder.

Step 3)

After 15 minutes, perform an exterior mechanical inspection and verify operation by turning the unit on and observing the RF power indicator on the unit or monitoring the transmission with a receiver. Record test results.

(c) *Salt Fog Test*

Step 1)

Place the EPIRB in a salt fog chamber for a period of at least 2 hours at a temperature of 35^0C ($\pm 2^0$C) before exposing it to salt fog. The EPIRB is to be turned off during this test.

Step 2)

With the chamber temperature maintained at 35^0C, introduce salt fog at the saturation point for 48 hours. The salt fog is to be prepared from a 5% ($\pm$ 1%) salt (sodium chloride) solution. For detailed guidance on the preparation of the solution and the apparatus for generating salt fog, refer to MIL-STD-810D (19 July 1983), method 509.2.

Step 3)

Upon completion of the salt fog exposure, the EPIRB is to be air-dried at room temperature for 12 hours and operation verified by turning the unit on and observing the RF power indicator on the unit or monitoring the transmission with a receiver. Record observations.

(d) *Drop Test*

This test is to be performed on EPIRB which are required or intended to float.

Step 1)

Turn the EPIRB on, log the time and drop it three times into water from a height of 20 meters. The water is to be deep enough so that the EPIRB does not touch bottom when dropped. Each drop should be initiated from a different orientation as follows: antenna vertical up; antenna vertical down; antenna horizontal.

Step 2)

Upon completion of the drop test, an exterior mechanical inspection is to be performed and operation verified by observing the RF power indicator on the unit or monitoring the transmission with a receiver. Record observations. Turn the test unit off and log the total on-time.

(e) *Forty-eight Hour Operational Test*

This test includes the battery life test and all the electrical tests given in Sections 2.1511, 2.1513 and 2.1515, below, at various temperatures. The tests are to be performed on the same EPIRB in the sequence specified herein. Be sure to record the on-time of the unit during each test. No more than 8 hours of total on time is permitted before commencing step 4. When operating the EPIRB in the environmental chamber, a non-radiating load may be substituted for the antenna provided it is electrically equivalent to the standard antenna and does not reduce the battery current drain.

Step 1)

Perform the radiated emissions test in Section 2.1511.

Step 2)

Perform the modulation characteristic tests in Section 2.1513.

Step 3)

Perform the spectral tests in Section 2.1515.

Step 4)

With the EPIRB off, place unit in an environmental chamber at a temperature of -20^0C for at least 2 hours.

Step 5)

With the EPIRB in the chamber, repeat the carrier frequency test in Section 2.1515(d). (Leave the EPIRB turned on.)

Step 6)

Near the end of 48 hours of total on-time for the EPIRB, repeat the carrier frequency test in Section 2.1515(d).

Step 7)

At the end of 48 hours of total on-time, remove EPIRB from the chamber and immediately repeat the PERP test for the fundamental emissions in Section 2.1511(c). The unit should be maintained at -20^0C to the extent possible for this test.

(f) *Float Free and Activation Test*

This test is required only for Class A EPIRBs.

Step 1)

The EPIRB is to be installed in the automatic release mechanism and the assembly is to be mounted on a fixture simulating a deck or bulkhead as per manufacturer's installation instructions.

Step 2)

Submerge the fixture in water in its normal mounted orientation. The EPIRB must float free before reaching a depth of 4 meters and should automatically activate. Activation is to be verified by observing the RF power indicator on the unit or monitoring the transmission with a receiver.

If the EPIRB is equipped with an automatically deployable antenna, the antenna must properly deploy during each immersion. Record observations.

(g) *Stability and Buoyancy Test*

This test is to be performed on EPIRBs which are required or intended to float. This test is to be conducted in fresh water.

Step 1)

With the antenna deployed in its normal operating position, submerge the EPIRB in a horizontal position just below the surface of the water.

Step 2)

Release the EPIRB and observe the amount of time required for it to come to an upright position. It must reach its upright position within one second from each position.

The EPIRB must have a reserve buoyancy of at least 5% of its gross weight. It must also float upright in calm water with the base of the antenna a minimum of 5 cm above the water. Record the time required for the test unit to right itself.

(h) *Temperature/Frequency Test*

The frequency stability shall be measured over an ambient temperature from -20^0 to $+55^0$C at intervals of not more than 10^0C. A period of time sufficient to stabilize all of the components of the oscillator circuit at each temperature level shall be allowed prior to frequency measurement.

Step 1)

Place the EPIRB in the environmental test chamber.

Step 2)

Adjust the temperature in the chamber to $+20^0$C and allow sufficient time for the oscillator to stabilize at that temperature.

Step 3)

Measure the carrier frequency in accordance with the procedure in Section 2.1515(d). Record the carrier frequency in Hertz. The carrier frequency at $+20^0$C is the reference for determining the frequency tolerance.

Step 4)

Increase the temperature in the chamber to $+55^0$C and allow sufficient time for the oscillator to stabilize at that temperature. Measure the carrier frequency using the procedure in Section 2.1515(d).

Step 5)

Reduce the temperature in the chamber in 10^0C maximum increments until -20^0C is reached. At each new temperature, allow sufficient time for the oscillator to stabilize at that temperature. Measure the temperature and frequency in each case and plot the frequency vs temperature from -20^0 to $+55^0$C.

(i) *Leakage and Immersion Test*

Step 1)

Completely submerge the EPIRB in water for 48 hours. The EPIRB is to be turned off during this test.

Step 2)

Remove the EPIRB from the water and wipe dry.

Step 3)

Verify operation by briefly turning the EPIRB on and observing the RF power indicator on the unit or monitoring the transmission with a receiver.

Step 4)

Open the EPIRB for examination. There is to be no water inside the unit. Record observations.

Section 2.1511 ***MEASUREMENTS OF RADIATED EMISSIONS***

The Commission's Rules require that the peak effective radiated power (PERP) of a Class A, B or S EPIRB not be less than 75 mW under certain specified conditions. The PERP of an EPIRB transmitter is determined by comparing its level to a reference PERP generated by a standard quarter-wave monopole antenna located on a one wavelength minimum diameter metal ground plane. The Rules also require that all spurious and harmonic emissions be attenuated by a specified amount with respect to the reference PERP. In addition, there is a limit on the PERP of radiated emissions with the switch in the test mode. These measurements are to be made in accordance with the following procedure.

(a) *General Set-up Instructions*

Measurements of radiated electromagnetic emissions (EME) are to be performed on the 30 meter open field test site described in Section 2.1503(a) and on one of the pair of frequencies listed in Section 2.1507. A receiver, tuned dipole antennas and a calibrated signal generator as described in Section 2.1505 are required. The EPIRB should be powered by its own internal battery with its standard antenna attached and deployed.

(b) *Set-up for radiated EME Tests*

Step 1)

Place a 121.5 MHz quarter-wave vertical antenna element at the center of the ground plane and connect the output of the calibrated signal generator to the antenna.

Step 2)

Mount the tuned dipole antenna on the antenna mast, tune the elements to 121.5 MHz and connect the antenna to the receiver.

Step 3)

After an appropriate warm up, turn the receiver to the frequency of the test unit, set the detector to peak mode and the bandwidth to 100 kHz. (Note: It is sometimes helpful to monitor the receiver audio output with a speaker. The EPIRB signal may be identified by its distinctive modulation.)

(c) *Radiated EME Tests*

Fundamental Emissions-Peak Effective Radiated Power

Step 1)

Turn on the signal generator and adjust the output to 75 mW at 121.5 MHz.

Step 2)

Vary the antenna height from one to four meters in both vertical and horizontal polarization. Record the highest receiver reading in dBm as the reference level.

Step 3)

Disconnect the signal generator and replace the quarter-wave vertical element on the ground plane with the EPIRB under test. The EPIRB is to be positioned directly on the surface of and in the center of the metal ground plane.

Step 4)

Activate the EPIRB.

Step 5)

Vary the receive antenna height from one to four meters in both vertical and horizontal polarization. Record the highest receiver reading in dBm and the instrument settings, antenna height and direction for maximum radiation, antenna polarization and conversion factors, if any, associated with that reading.

Step 6)

Repeat Step 5 with the EPIRB switch in the test position. Return the switch to the normal operation position.

Step 7)

Rotate the EPIRB 30 degrees and repeat Steps 5 and 6. Repeat this step for all successive 30 degrees segments of a full, 360 degree rotation of the EPIRB.

Step 8)

Repeat Section 2.1511(b) and Steps 1 through 7 for 243 MHz.

Step 9)

Compute the peak effective radiated power for the maximum level of each measured emission using the following formula:

$$PERP = 75 \times \log_{10}^{-1}\left[\frac{dBm_{meas} - dBm_{ref}}{10}\right]$$

where:

dBm_{meas} is the measured receiver reading in dBm, and dBm_{ref} is the reference receiver reading found in step 2 of Section 2.1511(c).

Step 10)

Record the PERP in mW. The FCC limit for minimum power in the normal operation mode (i.e., with the EPIRB switch in the normal operating position) is 75 mW. The FCC limit for maximum power in the test mode is 0.0001 mW.

Spurious Emissions

Step 11)

Reset the signal generator to operate at 121.5 MHz.

Step 12)

For each spurious and harmonic emission to be measured, retune the receive antenna to the appropriate frequency and repeat Steps 5 and 7.

Step 13)

Determine the FCC limit on power for spurious emissions on the frequency of each measured emission as follows:

The rules require that spurious emissions be attenuated at least 30 decibels below the transmit power level. Therefore, the maximum received power limit for a spurious emission can be calculated from the formula:

$$dBm_{spur} = dBm_{meas} + AF_{121.5} - AF_{spur\ freq} - 30$$

where: dBm_{meas} = measured receiver reading (Section 2.1511(c), step 5)

$AF_{121.5}$ = tuned dipole antenna factor at 121.5 MHz

$AF_{spur\ freq}$ = tuned dipole antenna factor at spurious freq.

Step 14)

Record in dB below the fundamental emissions the level of all spurious and harmonic emissions within 10 dB of the FCC limits.

Section 2.1513 ***MEASUREMENTS OF MODULATION CHARACTERISTICS***

(a) *Set-up*

Tests of modulation characteristics are to be performed in an RF shielded room.

Step 1)

Place the EPIRB directly on a metal ground plane, such as the shielded room floor.

Step 2)

Place a suitable receiving antenna at a convenient distance from the EPIRB and connect it to the input of the spectrum analyzer or receiver to observe the radiated signal from the EPIRB.

Step 3)

Set the spectrum analyzer or receiver controls as follows:

I.F. bandwidth:	300 kHz minimum
Video filter:	OFF or as wide as possible
Amplitude scale:	Linear
Frequency:	121.5 MHz
Scan width:	0 Hz

Step 4)

Connect the detected output of the spectrum analyzer or receiver to the input of the storage oscilloscope.

Step 5)

Set the oscilloscope controls as necessary to allow the demodulated waveform to be viewed. The input signal is to be DC coupled.

(b) *Measurement of Audio Frequencies*

Step 1)

Activate the EPIRB.

Step 2)

Trigger the oscilloscope and store at least one complete cycle of the audio waveform.

Step 3)

Measure the period (T) of the waveform. The period is the time difference between the half voltage points at the beginning and end of one complete cycle of the waveform. See Figure 2.

Step 4)

Calculate the frequency (F), where: $F = 1 / T$

Step 5)

Repeat Steps 2 through 4 until the highest and lowest audio frequencies are found. (Note: The lowest and highest frequencies may occur several cycles before or after the transition from low to high frequency.)

Step 6)

Determine the audio frequency range (F_{range}), where:

$$F_{range} = F_{high} - F_{low}$$

Step 7)

Record instrument settings and the lowest and highest audio frequencies. Record the audio frequency range in Hertz.

Step 8)

Repeat steps 1-8, above, for 243 MHz.

(c) *Modulation Factor*

Step 1)

Activate the EPIRB.

Step 2)

Trigger the oscilloscope and store at least one complete cycle of the audio waveform. The input signal is to be DC coupled or erroneous results will be obtained.

Step 3)

Measure the maximum voltage (V_{max}), and the minimum voltage (V_{min}) for the cycle. The modulation factor (M) is calculated from the following formula:

$$M = \frac{V_{max} - V_{min}}{V_{max} + V_{min}}$$

See Figure 2.

Step 4)

Repeat Steps 2 and 3 until the lowest modulation factor is found.

Step 5)

Record instrument settings and the lowest modulation factor, expressed as a ratio between 0 and 1.

Step 6)

Repeat the above measurements for 243 MHz.

(d) *Modulation Duty Cycle*

Step 1)

Activate the EPIRB.

Step 2)

Trigger the oscilloscope and store at least one complete cycle of the audio waveform.

Step 3)

Measure the period (T) of the waveform. The period is the time difference between the half voltage points at the beginning and end of one cycle of the waveform. See Figure 2.

Step 4)

Measure the pulse width (t_p) of the waveform. The pulse width is the time difference between the half voltage points on the rising and falling portions of the waveform. See Figure 2.

Step 5)

Calculate the duty cycle (D) as follows:

$$D = \frac{t_p}{T}$$

Step 6)

Repeat Steps 2 through 5 a sufficient number of times to determine the highest and lowest duty cycles.

Step 7)

Record instrument settings and the highest and lowest duty cycles in percent.

Step 8)

Repeat steps 1-7 for 243 MHz.

(e) *Sweep Repetition Rate*

Step 1)

Connect a speaker to the detected output of the spectrum analyzer or receiver so the audio frequencies are audible. Alternatively, an FM radio tuned to 108 MHz placed in the vicinity of the EPIRB may be used.

Step 2)

Activate the EPIRB.

Step 3)

Time the number of audio sweeps (N) for a one minute interval.

Step 4)

Calculate the audio sweep rate (R) using R = N / 60.

Step 5)

Record instrument settings and the sweep repetition rate in Hertz.

Section 2.1515 ***SPECTRAL MEASUREMENTS***

(a) *Set-up*

Spectral measurements are to be performed in a shielded room.

Step 1)

Place the EPIRB directly on a metal ground plane, such as the shielded room floor. The EPIRB should be powered by its own internal battery with its standard antenna attached and deployed.

Step 2)

Place a suitable receiving antenna at a convenient distance from the EPIRB and connect it to the input of the spectrum analyzer to observe the radiated signal from the EPIRB. A signal generator and frequency counter capable of operating at 121.5 and 243 MHz are also required for these tests.

(b) *Occupied Bandwidth Test*

Step 1)

Activate the EPIRB and observe the fundamental frequency on a spectrum analyzer. Adjust location of receiving antenna andspectrum analyzer controls to obtain a suitable signal level (i.e., a level which will not overload the spectrum analyzer, but is far enough above the noise floor to allow determination of whether or not the sidebands are attenuated by at least the amount required in the rules).

Step 2)

Set spectrum analyzer controls as follows:

I.F. bandwidth:	10 kHz
Video filter:	OFF or as wide as possible
Scan time:	100 ms./div.
Amplitude scale:	10 dB/div.
Scan width:	20 kHz/div.
Center frequency:	121.5 MHz

Step 3)

Record the signal level in dbm.

Step 4)

Calculate the mean power reference level by adding 10 $\log_{10}(D)$, where D is the modulation duty cycle determined in Section 2.1513(d), to the recorded signal level.

Step 5)

Set spectrum analyzer controls as follows:

I.F. bandwidth:	100 Hz
Video filter:	OFF or as wide as possible
Scan time:	10 sec./div.
Amplitude scale:	10 dB/div.
Scan width:	20 kHz/div.

Step 6)

Check the modulation sidebands for compliance with the required attenuation below the mean power reference level specified in Section 80.211 of the Rules.

Step 7)

Record how the test was performed, instrument settings and the occupied bandwidth in kHz and the 3 dB bandwidth of the carrier in Hz. (See Section 2.1517)

Step 8)

Repeat steps 1 through 7 for the signal at 243 MHz.

(c) *Signal Enhancement Test*

The setup specified in Section 2.1515(a) above is to be used in this method of measuring signal enhancement. Other methods may be used if shown to give results equivalent to or more accurate than this method.

Step 1)

Activate the EPIRB and locate the carrier frequency at 121.5 MHz on the spectrum analyzer. Adjust location of receiving antenna and spectrum analyzer controls to obtain a suitable signal level (i.e., a level which will not overload the analyzer, but is far enough above the noise floor to allow sidebands at least 40 dB below the carrier to be viewed).

Step 2)

Set the spectrum analyzer controls as follows:

I.F. bandwidth:	10 kHz
Video filter:	OFF or as wide as possible
Scan time:	100 ms./div.
Amplitude scale:	5 dB/div.
Scan width:	10 kHz/div.
Center frequency:	121.5 MHz

Step 3)

Record the amplitude in dBm.

Step 4)

Calculate the total power output by adding 10 log(D), where D is the modulation duty cycle determined in Section 2.1513(d), to the recorded signal level.

Step 5)

Set the spectrum analyzer controls as follows:

I.F. bandwidth:	60 Hz or less
Video filter:	OFF or as wide as possible
Scan time:	10 sec./div.
Amplitude scale	5 dB/div.
Scan width:	20 Hz/div.
Center frequency:	121.5 MHz

Step 6)

Measure and record the carrier power in dBm as displayed on the spectrum analyzer.

Step 7)

Calculate the ratio of carrier power to total power from steps 4 and 6 using the following formula:

$$\frac{\text{carrier power}}{\text{total power}} = \log_{10}^{-1}\left[\frac{dB_c - dB_T}{10}\right]$$

dB_c = carrier power in step 6

dB_T = total power in step 4

Step 8)

Record instrument settings, sample calculation and the percent of power within ±30 Hz at 121.5 MHz or 60 Hz at 243 MHz of the carrier frequency.

Step 9)

Repeat the above measurement steps 1 through 8 for 243 MHz. For the higher frequency, the I.F. bandwidth in step 5 must be 120 Hz or less.

(d) *Carrier Frequency Test*

The setup specified in Section 2.1515(a) above is to be used in measuring the carrier frequency.

Step 1)

Activate the EPIRB and locate the 121.5 MHz signal on the spectrum analyzer. Adjust location of receiving antenna and spectrum analyzer controls to obtain a suitable signal level.

Step 2)

Set the spectrum analyzer controls as follows:

I.F. bandwidth:	100 Hz
Video filter:	OFF or as wide as possible
Scan time:	10 sec./div.
Amplitude scale:	10 dB/div.
Scan width:	20 Hz/div.
Center frequency:	121.5 MHz

Step 3)

Combine the output of the signal generator with the EPIRB signal at the input to the spectrum analyzer.

Step 4)

Adjust amplitude and frequency of signal generator output to determine center of carrier frequency component.

Step 5)

Measure signal generator frequency with frequency counter with accuracy of 5 PPM or better and record as carrier frequency.

Step 6)

If applicable, change the type of modulation of the EPIRB and record the shift in carrier frequency as observed on the spectrum analyzer display.

Step 7)

Repeat the above measurement steps 1 through 6 for 243 MHz.

DATA RECORDING/ REPORTING REQUIREMENTS

Section 2.1517 ***DATA RECORDING/REPORTING REQUIREMENTS***

The test report for an EPIRB shall contain the following information:

1) Specific identification, including the FCC ID, model and serial numbers, of the EPIRB under test.

2) The name and location of the test sites used for the measurements.

3) A description of the instrumentation and equipment, including antennas, used to perform the tests. For purchased equipment, the type, manufacturer and model number are generally sufficient as a description.

4) The test results and associated comparative information.

5) A description of any modifications made to the EUT or other system components during the testing.

6) A description and justification of all deviations from the procedures described herein.

7) The name and qualifications of the person responsible for the tests.

8) The date the tests were performed.

9) A statement signed by the individual responsible for the test that the EPIRB as tested complies or does not comply with the applicable FCC rules.

10) A statement signed by the individual responsible, either directly or indirectly, for production or marketing of the device tested that the unit tested is representative of the equipment that will be marketed.

Figures

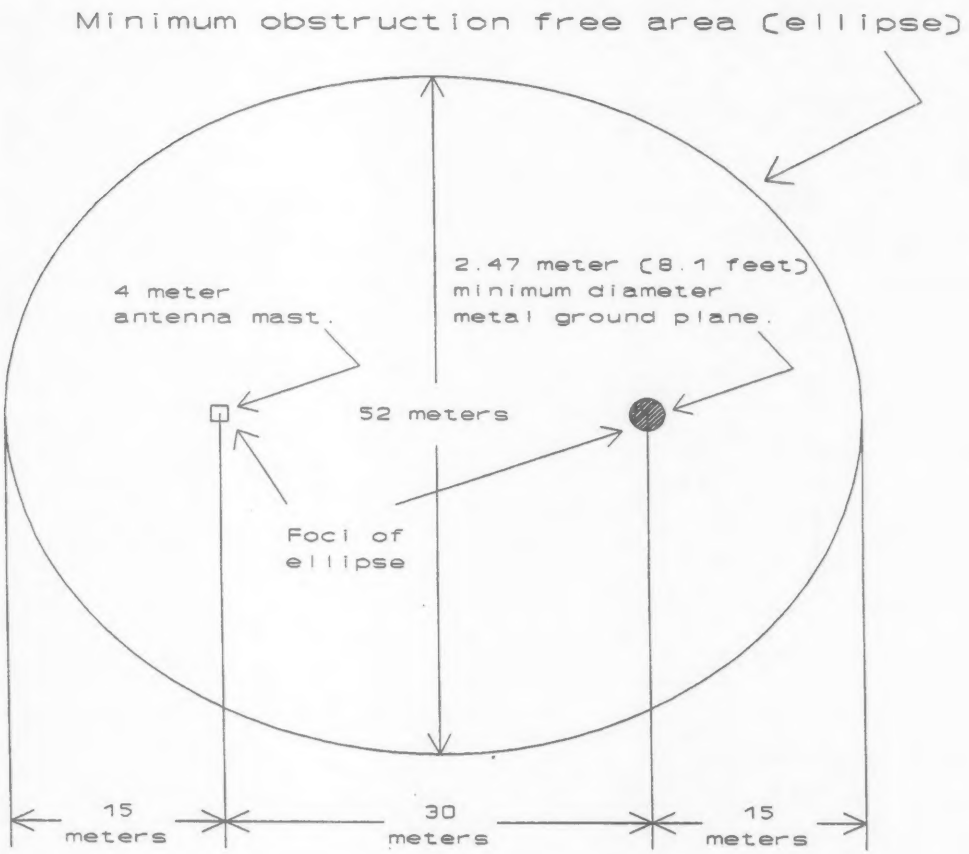
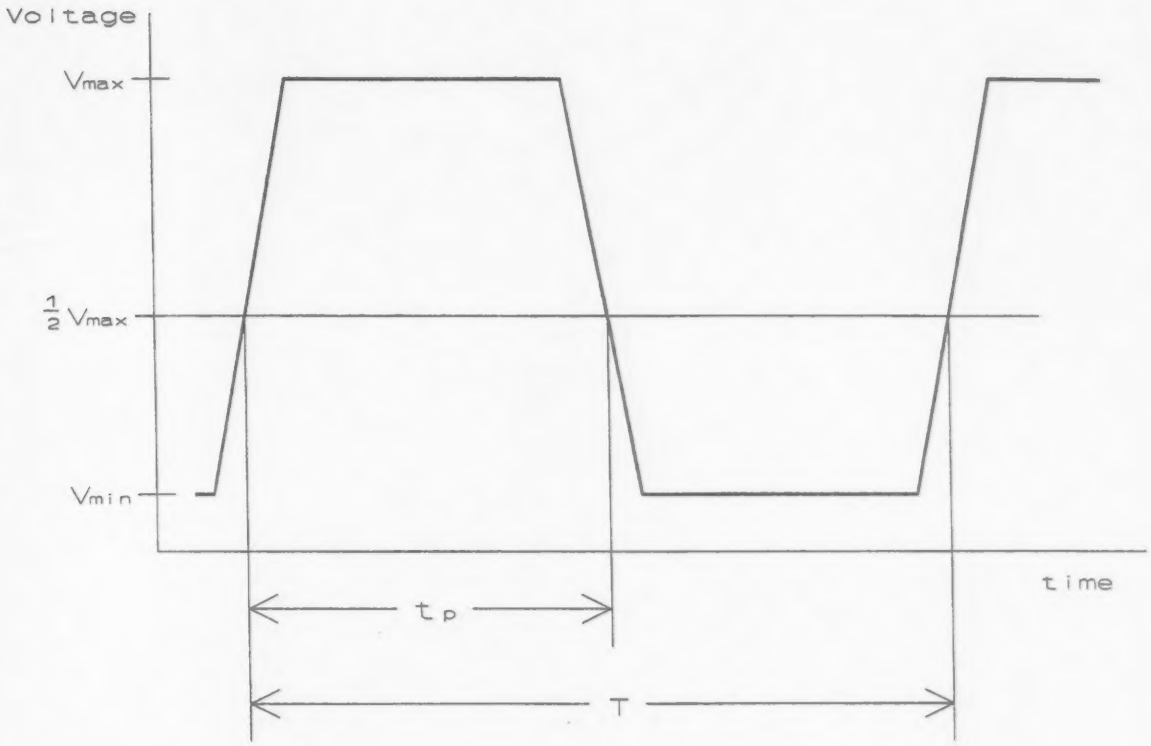


Figure 1 - Measurement Site



Frequency: $f = \frac{1}{T}$

Duty cycle: $D = \frac{t_p}{T}$

Modulation factor: $M = \frac{V_{max} - V_{min}}{V_{max} + V_{min}}$

Figure 2 - Typical Audio Waveform

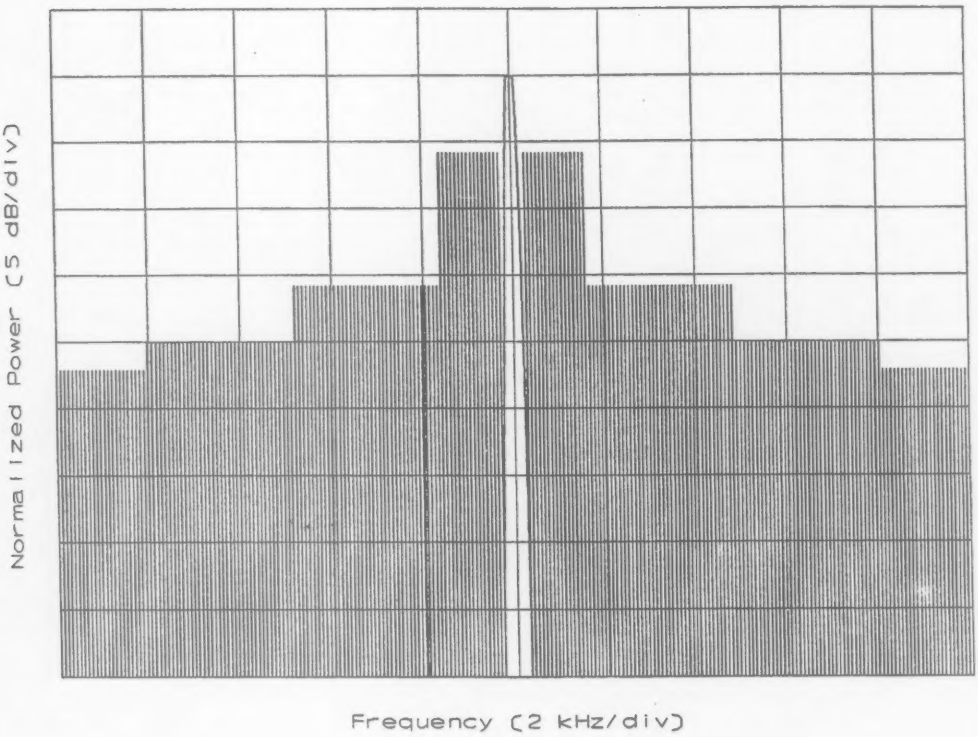


Figure 3 - Example of ideal EPIRB Spectrum

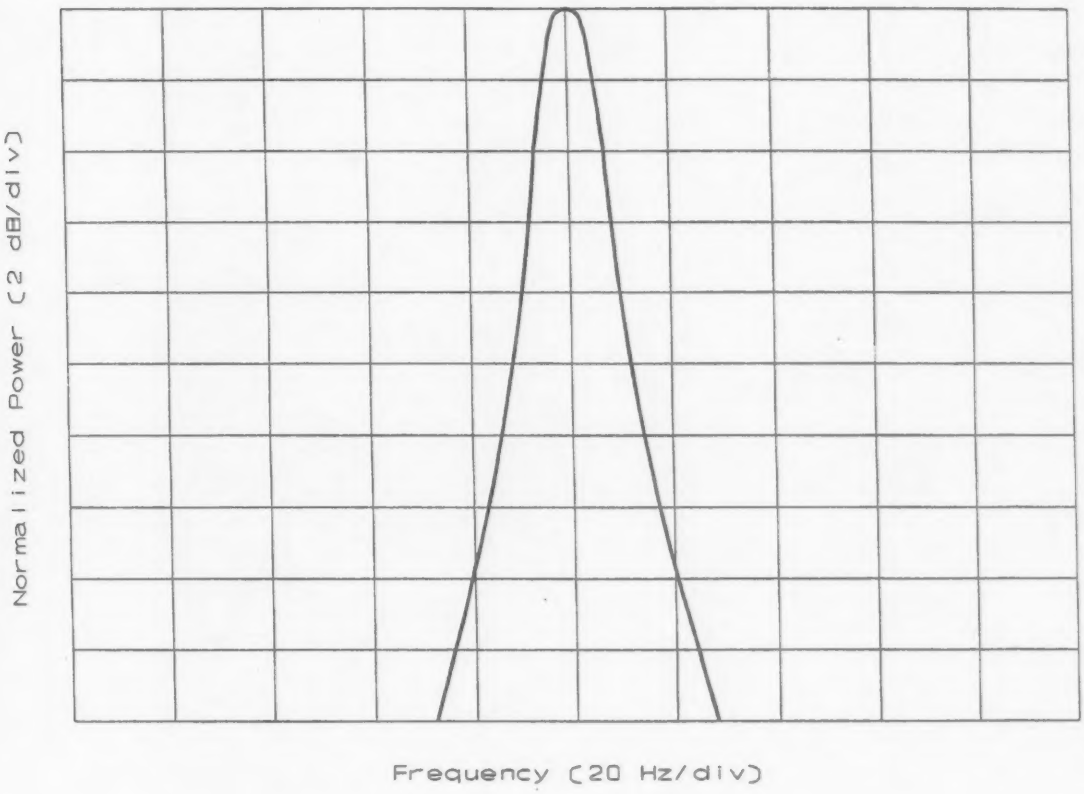


Figure 4 - Example of EPIRB Carrier Component

FOOTNOTES

[1] This investigation was in response to complaints that certain EPIRBs had problems resulting from water leakage. The U.S. Coast Guard requires that Class A EPIRBs be carried aboard certain types of ships.

[2] *See Report and Order* PR Docket No. 87-133, 3 FCC Rcd 1027 (1988).

[3] *See* 47 CFR Section 80.1053(a)(8).

[4] *Id.*, at paragraph 14.

[5] *See Notice of Proposed Rulemaking*, GEN Docket No. 89-623, adopted December 20, 1989, 5 FCC Rcd 345 (1990).

[6] The RTCM petition also raised several EPIRB policy issues. These other issues are being addressed in PR Docket No. 89-622. *See Notice of Proposed Rule Making* in PR Docket No. 89-622, 5 FCC Rcd 647 (1990).

[7] RTCM Recommended Standards for 406 MHz Satellite Emergency Position-Indicating Radiobeacons (EPIRBs), July 31, 1987.

[8] *See Report and Order* in PR Docket No. 89-622, adopted February 5, 1991, FCC 91-41.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-51

In the Matter of

Amendment of Section 73.202(b), RM-7625
Table of Allotments,
FM Broadcast Stations.
(Steeleville, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 28. 1991; Released: March 11, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Steeleville Communications ("petitioner") requesting the allotment of Channel 248A to Steeleville, Illinois, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by this proposal since it could provide Steeleville with its first local FM channel. A Commission engineering analysis has determined that Channel 248A can be allotted to Steeleville in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.5 kilometers (4 miles) west of the community.[1] The site restriction is necessary in order to avoid a short-spacing to Station WFRX(FM), Channel 249A, West Frankfort, Illinois.

3. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Steeleville, Illinois	--	248A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 2, 1991,** and reply comments on or before **May 17, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Philip M. Baker
4701 Willard Avenue
Washington, D.C. 20815
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 38-01-18 and West Longitude 89-43-47.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-52

In the Matter of

Amendment of Section 73.202(b), RM-7373
Table of Allotments,
FM Broadcast Stations.
(Macclenny and Williston, Florida)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: February 28, 1991; Released: March 11, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by WJXR, Inc. ("petitioner"), licensee of Station WJXR(FM), Channel 221A, Macclenny, Florida. Petitioner requests the substitution of Channel 221C3 for Channel 221A at Macclenny, and modification of its license to specify the higher class channel. In order to accomplish the upgrade, petitioner requests the substitution of Channel 267A for Channel 221A at Williston, Florida, and modification of the license of Station WFEZ(FM), Channel 221A, Williston, to specify the new channel. Petitioner states its intention to apply for the channel, if allotted.

2. In support of its proposal, petitioner states that Channel 221C3 would provide Macclenny with its first wide area service and improve service to the surrounding area. In addition, the substitution of Channel 267A for Channel 221A at Williston will enable Station WFEZ(FM) to operate as a 6.0 kilowatt Class A FM station from its present transmitter site. Petitioner has stated its willingness to reimburse the licensee of Station WFEZ(FM) for its reasonable costs incurred to change frequencies.

3. We believe the public interest would be served by proposing the substitution of Channel 221C3 for Channel 221A at Macclenny and Channel 267A for Channel 221A at Williston because this proposal could provide Macclenny with an expanded coverage FM service. Channel 221C3 can be substituted for Channel 221A at Macclenny in compliance with the Commission's minimum distance separation requirement at Station WJXR's licensed site 10.5 kilometers (6.5 miles) east of the community, in order to avoid short spacings to the sites specified in the construction permits for Station WNLE(FM), Channel 219C2, Fernandina Beach, Florida, and Station WZAZ(FM), Channel 224A, Green Cove, Florida. Channel 221C3 at Macclenny conflicts with two applications for noncommercial FM Channel 220A. These applicants are Ocala Radio Ministries, Inc., at Saint Augustine, Florida (BPED-900423MA), and Putnam Radio Ministries, Inc., at Palatka, Florida (BPED-900521MD). Each applicant will be served with a copy of this *Notice*. Channel 267A can be substituted for Channel 221A at Williston, in compliance with the Commission's minimum distance separation requirements at Station WFEZ(FM)'s current license site 10.5 kilometers (6.5 miles) west of Williston.[1]

4. In accordance with Section 1.420(g)(3) of the Commission's Rules, we shall propose to modify Station WJXR(FM) without entertaining other expressions of interest. In addition, we are herein issuing an *Order to Show Cause* to the licensee of Station WFEZ(FM) at Williston, Florida, why its license should not be modified to specify operation on Channel 267A in lieu of Channel 221A.

5. In view of the above the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Macclenny, Florida	221A	221C3
Williston, Florida	221A	267A

6. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Gulf to Bay Broadcasting Co. Inc., licensee of Station WFEZ(FM), Channel 221A, Williston, Florida, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 267A in lieu of Channel 221A.

7. Pursuant to Section 1.87 of the Commission's Rules, Gulf to Bay Broadcasting Co. Inc., may, not later than **May 2, 1991,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Gulf to Bay Broadcasting Co. Inc. to furnish additional information. If Gulf to Bay Broadcasting Co. Inc. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Gulf to Bay Broadcasting Co. Inc. will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the licensee of Station WFEZ(FM) and the applicants for Channel 220A at Palatka and Saint Augustine, Florida, as follows:

Gulf to Bay Broadcasting Corporation Inc.
3161 Northwest 13th Street
Gainesville, Florida 32609.
(Licensee of Station WFEZ(FM))

Ocala Radio Ministries, Inc.
P.O. Box 2
Ramey, Puerto Rico 00604
(BPED-900423MA)

Putnam Radio Ministries, Inc.
3111 St. Johns Avenue
Palatka, Florida 32177
(BPED-900521MD)

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **May 2, 1991,** and reply comments on or before **May 17, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Frederick A. Polner
Richard K. Olson, Jr.
Rothman, Gordon, Foreman
& Groudine, P.C.
Third Floor, Grant Building
Pittsburgh, PA 15219
(Attorneys for WJXR, Inc.)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is

directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 221C3 at Macclenny are North Latitude 30-17-54 and West Longitude 82-00-55. The coordinates for Channel 267A at Williston are North Latitude 29-25-04 and West Longitude 82-32-58.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-53

In the Matter of

Amendment of Section 73.202(b), RM-7591
Table of Allotments,
FM Broadcast Stations.
(Bronson, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 28, 1991; Released: March 11, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Spring Arbor College Communications ("petitioner") requesting the allotment of Channel *234A to Bronson, Michigan, and its reservation for noncommercial educational use. Petitioner submitted information in support of the proposal and states its intention to apply for the channel.

2. Generally, noncommercial educational stations operate within the reserved portion of the FM band (Channels 201-220). However, exceptions have been made where channels in the noncommercial educational band are not available because of foreign allotments (Canadian or Mexican) or potential interference to operation on VHF Television Channel 6. Here, potential interference to Station WLNS-TV, Channel 6, Lansing, Michigan, appears to justify the reservation of a channel in the nonreserved band (Channels 221-300) for noncommercial educational use. The allotment and reservation of a commercial channel appears to be the only way to provide a noncommercial educational channel to Bronson. We note, however, that Channel 234A is the only channel that can be allotted to Bronson. Any expressions of interest for use of the channel as a commercial facility should be made during the comment period.

3. We believe the public interest would be served by proposing to allot Channel *234A to Bronson, Michigan, and to reserve the channel for noncommercial educational use. *See Bozeman, Montana*, 4 FCC Rcd 4835 (1989), and *Duluth, Minnesota*, 4 FCC Rcd 3763 (1989). The channel can be allotted to Bronson in compliance with the Commission's minimum distance separation requirements provided there is site restriction 12.5 kilometers (7.8 miles) southwest of the community.[1] The site restriction will prevent a short spacing to Station WVIC-FM, Channel 235B, East Lansing, Michigan. Since Bronson is located within 320 kilometers (200 miles) of the U.S. - Canadian border, concurrence of the Canadian government will be requested.

4. In view of the foregoing, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following community:

	Channel No.	
City	Present	Proposed
Bronson, Michigan	-----	*234A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 2, 1991,** and reply comments on or before **May 17, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

E. Harold Munn, Jr., President
Spring Arbor College Communications
100 Airport Drive
Coldwater, Michigan 49036
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordiantes for Channel *234A at Bronson are 41-46-41 and 85-16-32.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-54

In the Matter of

Amendment of Section 73.202(b), RM-7623
Table of Allotments,
FM Broadcast Stations.
(Herington, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 28, 1991; Released: March 11, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition filed by Marie Willis and Donald D. Willis ("petitioner") requesting the substitution of FM Channel 289C3 for Channel 289A at Herington, Kansas. Petitioner also requests modification of its construction permit (BPH-880712ML) for Station KDMM, Channel 289A, to specify operation on Channel 289C3. Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because adoption of the proposal would provide Herington with a wide coverage area FM station. Channel 289C3 can be allotted to Herington, Kansas, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site 8.7 kilometers (5.4 miles) southwest of the community.[1] We shall also propose to modify petitioner's construction permit for Station KDMM to specify operation on Channel 289C3 in lieu of Channel 289A. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of the higher powered channel at Herington or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

3. In view of above, the Commission believes it appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Herington, Kansas	289A	289C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 2, 1991,** and reply comments on or before **May 17, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Marie Willis and
Donald D. Willis
115 North 8th Street
Herington, Kansas 67449
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 289C3 are 38-38-30 and 97-02-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-55

In the Matter of

Amendment of Section 73.202(b), RM-7624
Table of Allotments,
FM Broadcast Stations.
(Missoula, Montana)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 28, 1991; Released: March 11, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Smith Broadcasting, Inc. ("petitioner"), requesting the substitution of FM Channel 261C1 for Channel 261C3 at Missoula, Montana. Petitioner also requests modification of its construction permit for Station KZOQ-FM, Channel 261C3, to specify operation on Channel 261C1. Petitioner provided an engineering study in support of the proposal and indicated it would apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because the proposed substitution could provide enhanced service to Missoula, Montana. Channel 261C1 can be allotted to Missoula, Montana, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site.[1] Since Missoula is located within 320 kilometers (200 miles) of the U.S. - Canadian border, concurrence of the Canadian government will be requested for this allotment. We shall also propose to modify the construction permit for Station KZOQ-FM, Channel 261C3 to specify operation on Channel 261C1 in accordance with Section 1.420(g) of the Commission's Rules. We shall not accept competing expressions of interest in the use of the higher powered channel at Missoula or require petitioner to demonstrate the availabilty of additional equivalent class channel for use by such interested parties.

3. In view of the above, the Commission believes it is in the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Missoula, Montana	227C, 235C 261C3, 273C1	227C, 235C, 261C1, 273C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 2, 1991,** and reply comments on or before **May 17, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jeff M. Smith, President
Smith Broadcasting, Inc.
2300 Regent St., P.O. Box 2277
Missoula, Montana 59801
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinate for Channel 261C1 are 46-48-08 and 113-58-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-56

In the Matter of

Amendment of Section 73.202(b), RM-7350
Table of Allotments,
FM Broadcast Stations.
(Karnes City, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 28, 1991; Released: March 11, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Karnes Broadcasting Company ("petitioner") requesting the allotment of Channel 276C2 to Karnes City, Texas, as that community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 276C2 to Karnes City, Texas, since it could provide the community with its first local FM service. Channel 276C2 can be allotted to Karnes City at petitioner's proposed site in compliance with the Commission's minimum distance separation requirements, with a site restriction of 5.9 kilometers (3.7 miles) north[1] to avoid a short-spacing to Channel 275C2 at Alice, Texas, which has been reserved for Station KBIC. Since Karnes City, Texas, is located within 320 kilometers (199 miles) of the U.S. - Mexican border, concurrence by the Mexican government has been requested.

3. Accordingly, for the reasons described above, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Karnes City, Texas	--	276C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 2, 1991,** and reply comments on or before **May 17, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner as follows:

Robert S. Eckols, d/b/a
Karnes Broadcasting Company
Route 1, Box 148
Kenedy, Texas 78119

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Fawn E. Wilderson, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 276C2 at Karnes City, Texas, are 28-56-14 and 97-53-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-20

In the Matter of

Amendment of Section 73.202(b), RM-7124
Table of Allotments,
FM Broadcast Stations.
(Marina, Salinas and Seaside,
California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 25, 1991; Released: March 11, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 5 FCC Rcd 628 (1990), issued in response to a petition for rule making filed on behalf of Model Associates, Inc. ("petitioner"), licensee of Station KBOQ(FM), Channel 224A, Marina, California, proposing the substitution of Channel 224B1 for Channel 224A at Marina, California, and modification of the license for Station KBOQ(FM) to specify operation on the higher class channel. In order to accommodate petitioner's proposal, the *Notice* also proposed to substitute Channel 280A for Channel 278A at Seaside, California, an allotment for which four applications are pending, to substitute Channel 278A for Channel 280A at Salinas, California, and to modify the license of KCTY AM & KRAY FM, Inc. ("KRAY"), licensee of Station KRAY-FM, Channel 280A, Salinas, accordingly. The Salinas substitution would require Station KRAY-FM to relocate its transmitter to avoid a conflict with Station KBEE-FM, Channel 277B, Modesto, California.[1] KRAY has agreed to do so, provided it is reimbursed for its reasonable costs associated with the frequency change and site relocation.[2] Petitioner filed supporting and supplemental comments. [3] KRAY also filed supporting comments. No other comments were received.

2. We believe the public interest would be served by adopting the proposal to substitute Channel 224B1 for Channel 224A at Marina, substituting Channel 278A for Channel 280A at Salinas, and substituting Channel 280A for Channel 278A at Seaside, California, since it would enable Station KBOQ(FM) to provide an expanded coverage FM service to the community. The Salinas modification proposal would enable Station KRAY-FM to relocate its transmitter to an area that could permit it to operate with maximum Class A facilities, a benefit from which it is presently precluded.[4] Additionally, the proposed substitution of Channel 280A for Channel 278A at Seaside would enable the applicants to specify a nonrestricted site.

3. As indicated in the *Notice*, Channel 224B1 can be allotted to Marina at the site authorized in the construction permit issued to Station KBOQ(FM).[5] Channel 278A can be allotted to Salinas at the site specified by KRAY.[6] Channel 280A can be allotted to Seaside without the imposition of a site restriction.[7,8]

4. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Station KBOQ(FM) to specify operation on Channel 224B1 in lieu of Channel 224A at Marina. Since KRAY has consented to change its frequency of operation and to relocate the transmitter for Station KRAY-FM, we are also modifying its license to specify Channel 278A in lieu of Channel 280A. Petitioner is expected to reimburse KRAY for the reasonable costs associated with the modification of its facilities. *See Circleville, OH*, 8 FCC 2d 159 (1967), and *Dickinson, TN*, 4 FCC Rcd 8707 (1989). However, KRAY will not be required to effectuate the facility changes for Station KRAY-FM until a construction permit has been issued to the petitioner for the upgraded facilities at Marina. Finally, the Seaside applicants may amend their applications to specify Channel 280A in lieu of Channel 278A without loss of "cut-off" protection. *See Marion, MS*, 4 FCC Rcd 3720 (1989).

5. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Marina, California	224B1
Salinas, California	250A, 264B, 273B,278A
Seaside, California	280A, 296B1

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license issued to Model Associates, Inc. for Station KBOQ(FM), Marina, California, IS MODIFIED to specify operation on Channel 224B1 in lieu of Channel 224A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license issued to KCTY AM and KRAY FM, Inc. for Station KRAY-FM, Salinas, California, IS MODIFIED to specify operation on Channel 278A in lieu of Channel 280A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KRAY-FM's license (BLH-7070) except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with the license (BLH-7070) except for the channel as specified above and a license application (FCC Form 302) is filed within ten (10) days of commencement of program tests.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Report and Order* to the KCTY AM & KRAY FM, Inc., P.O. Box 1939, Salinas, CA 93902, and to the applicants for Channel 278A at Seaside, California, as follows: The Dunlin Group, 1141 Fremont Boulevard, Seaside, CA 93955; Seaside Wireless, Ltd., 14524 Maplewood St., Poway, CA 92064; Coastal Broadcasting Company, 8007 River Place, Carmel, CA 93923; and H. H. & L. Communications, 390 Elm Street, Seaside, CA 93955.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates at the licensed site of Station KBEE-FM are 37-34-30 and 121-21-13.

[2] In view of KRAY's consent to the modification and relocation of its transmitter, an *Order to Show Cause* was not issued to the licensee.

[3] Petitioner's supplemental comments, which clarify its reimbursement obligation to KRAY, were untimely but leave to file was requested. Since this is an uncontested proceeding, we will accept petitioner's comments. Petitioner initially committed itself to reimburse Station KRAY-FM, but advised after adoption of the *Notice*, that Loma de Gavilan Broadcasting Group ("Loma"), a former applicant for Channel 282A at Gonzales, California, had committed to paying the reimbursement costs to KRAY. Petitioner's supplemental comments advise that although Loma is establishing an escrow account to cover petitioner's reimbursement costs to KRAY, petitioner commits to reimbursing KRAY's expenses related to the frequency change and transmitter relocation, irrespective of any agreement with Loma.

It is clearly incumbent upon the petitioner, as the benefitting party, to discharge its reimbursement obligation to KRAY. Any agreement between petitioner and Loma constitutes a private matter between those parties.

[4] Station KRAY-FM presently operates with 3.0 kW, at a reduced height of -41 meters. Petitioner advised that although KRAY has attempted to locate a site from which it could operate Station KRAY-FM on Channel 280A at full operating values (*i.e.*, 3 kW at 100 meters pursuant to the provisions of Section 73.213(c)), it has been unsuccessful. Petitioner adds that the requested substitution at Salinas could afford Station KRAY-FM an opportunity to improve its operating facilities.

[5] Coordinates at the authorized site for Station KBOQ(FM) at Marina are 36-33-09 and 121-47-17.

[6] Coordinates at the site specified for Station KRAY-FM at Salinas are 36-38-01 and 121-30-23.

[7] Coordinates for Channel 280A at Seaside are 36-36-48 and 121-50-12.

[8] Because the petition which resulted in these allotments was filed prior to October 2, 1989, the licensee of Station KRAY-FM, Salinas, may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Channel 280A, Seaside, at coordinates 36-36-48 and 121-50-12, as well as to grandfathered Station KBEE-FM, Channel 277B, Modesto, at coordinates 37-34-30 and 121-21-13.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-29

In the Matter of

Amendment of Section 73.202(b),	RM-4941
Table of Allotments,	RM-5399
FM Broadcast Stations.	
(Greenup, Kentucky and Athens, Ohio)	

MEMORANDUM OPINION AND ORDER

Adopted: February 26, 1991; Released: March 11, 1991

By the Commission:

1. The Commission has before it the Application for Review filed by Greenup County Broadcasting, Inc. ("GCB"), licensee of Station WLGC-FM, Greenup, Kentucky. GCB seeks review of the *Memorandum Opinion and Order* (" *MO&O* ") in this proceeding, 4 FCC Rcd 3843 (1989). The *MO&O* 1) granted a petition for reconsideration of the *Report and Order* (" *R&O* ") in this proceeding, 2 FCC Rcd 4319 (1987), filed by WATH, Inc. ("WATH"), licensee of Station WXTQ-FM, Athens, Ohio, 2) substituted FM Channel 289B1 (105.7 MHz) for adjacent Channel 288A (105.5 MHz) at Athens, 3) modified the license for Station WXTQ-FM to specify operation on the new frequency, and (4) reversed the *R&O*'s grant of GCB's mutually exclusive proposal to upgrade its station at Greenup, Kentucky. WATH filed an opposition to GCB's Application for Review, and both parties filed related pleadings.[1]

BACKGROUND

2. Conflicting proposals for an amendment of the FM Table of Allotments are compared using the allotment priorities set forth in *Revision of FM Policies*, 90 FCC 2d 88 (1982):

(1) first full-time aural service;

(2) second full-time aural service;

(3) first local service; and

(4) other public interest matters.

[Co-equal weight given to priorities (2) and (3)]

After rejecting claims by WATH that the Athens upgrade would provide a second aural service to a significantly sized population, the staff compared GCB's and WATH's conflicting proposals for the substitution of FM Channel 289B1 for Channel 288A at their respective communities by using the fourth of the allotment priorities, other public interest matters.[2] The staff determined that the upgrade at Station WLGC-FM would provide a new service to a larger population than would the upgrade of WATH's Station WXTQ-FM. Specifically, the staff calculated the population within each station's Class B1 predicted primary service contour, and then subtracted the population within each station's predicted Class A primary service contour. [3] For Class A and B1 stations, the staff utilized, respectively, predicted service contours with radii of 24 kilometers and 45 kilometers from the proposed stations' transmitter sites. At these distances, the approximate field strengths are 1.0 mV/m and 0.7 mV/m for Class A and B1 stations, respectively, operating at maximum facilities.[4] The staff concluded that WLGC-FM's proposal would result in a new primary service to the greater number of persons, and, therefore, should be preferred.

3. On reconsideration, the staff revised the methodology used in its coverage determinations, and after consideration of certain changed circumstances, found that the proposal to upgrade WXTQ-FM at Athens would better serve the public interest. The staff reversed the *R&O* and granted WATH's request to upgrade WXTQ-FM. The staff revised the methodology after reconsidering two issues: 1) whether the signal strength contour to be used in calculating coverage of Class B1 stations should be 0.7 mV/m, or whether it should be 1.0 mV/m, regardless of station class, and 2) whether coverage areas should be calculated by assuming maximum power and antenna height for each allotment under consideration. The staff resolved the first issue by concluding that the 1.0 mV/m contour should form the basis for coverage determinations including gain area calculations. *See* 4 FCC Rcd at 3844, 3845.

4. Turning to the second issue, the staff rejected WATH's interpretation of *Roanoke Rapids*.[5] In *Roanoke Rapids*, the Commission was faced with how, in allotment proceedings where claims of first and second aural services arise, to calculate either actual or potential service on an allotment. At that time, 1967, many allotments were unoccupied or being operated at less than maximum facilities. Recognizing this, and recognizing that allotments would be more extensively used in the future, the Commission concluded that potential service from existing allotments should be considered in examining claimed coverage preferences. In determining the potential coverage represented by an allotment, the Commission concluded that its calculations need not be limited by the actual facilities in use on the allotment, but could assume that "reasonable facilities" would be used on allotments. The Commission assumed the maximum permissible facilities for Class A allotments, and the greater of actual facilities or 30 kilowatts ("kW") effective radiated power ("ERP") and 300 feet height above average terrain ("HAAT") for Class B stations, and the greater of actual facilities or 75 kW ERP and 500 feet HAAT for Class C stations. Although the staff adhered to the *Roanoke Rapids* "reasonable facilities" test in the *MO&O*, it disagreed with GCB's contention that the specific station parameters set forth in *Roanoke Rapids* should be applied in this case. The staff noted the substantial development of the FM service since 1967, and the substantial incentives for stations to specify maximum facilities. It concluded that, rather than strictly adhering to the specific technical assumptions relied upon in the Commission's 1967 decision, it would better comport with the intent of *Roanoke Rapids* to assume maximum facilities not only for Class A stations, but for Class B and the more recently created Classes C1, C2, and B1.[6,7]

5. Applying these standards to the facts in existence at the time the *R&O* was decided, the staff determined that its earlier action was correct. However, the staff noted in the *MO&O* that an existing station had relocated. The resulting shift in coverage created a "gray"[8] area with a significantly sized population, which WXTQ-FM as a Class B1 station would provide a second full-time aural service. The staff found this shift significant enough to require alteration of its decision. Because the *MO&O* awarded the upgrade to WATH, the staff did not address WATH's argument that the upgraded Athens station would provide gain area service to significantly larger areas currently receiving only two, three, or four services than would the upgraded Greenup station, and that the Athens upgrade proposal should, therefore, be preferred over that for Greenup.

THE PLEADINGS

6. In its Application for Review, GCB contends that the staff erred when it reversed the *R&O* based on changed circumstances. GCB notes the existence of an allotment at McArthur, Ohio, at the time of the *MO&O*'s issuance. That allotment, argues GCB, would provide for a second full-time aural service to the area of Vinton County, Ohio, that the staff believed would receive second aural service from an upgraded WXTQ-FM. GCB also claims that there is no "underserved" area within Vinton County, because an upgrade proposal is currently pending for WKOV-FM at Wellston, Ohio, which would also eliminate such gray area.[9] In addition to the staff's factual error, and in the alternative, GCB takes issue with the staff's other determinations.[10] Apparently assuming that these factual matters will justify further comparison of the two upgrades, and anticipating that the Commission will be required to address the contention raised by WATH that the services received within a gain area should be a factor in the Commission's decision, GCB contends that the question of which upgrade provides service to the greatest population in its gain area, as answered by the staff in its *R&O*, was the dispositive question.

7. In opposition, WATH argues that the staff properly excluded the McArthur, Ohio, allotment from consideration in the *R&O*. It speculates that this allotment was obtained by GCB and its sister company during the instant rule making proceeding with the alleged motive of affecting WATH's position in this proceeding. WATH concludes that the Commission should give minimal weight to the existence of this allotment. WATH does not address the upgrade at Wellston.

8. Notwithstanding, WATH advances an argument that it put forth in its petition for reconsideration but the *MO&O* did not address, namely that the Commission should use the same coverage standards applied in comparative hearings, in which vacant allotments are disregarded and both the total population within a gain area and the number of persons receiving two, three, or four existing services are considered. While WATH believes that the Commission should consider a greater population within a gain area as deserving of a preference, it argues that such preference should be mitigated if that population already receives five or more full-time aural services. WATH notes that it submitted substantial evidence in this proceeding that its upgrade would serve a greater number of persons currently receiving fewer than five aural services than would GCB's proposed upgrade.[11] It concludes its proposal should be preferred.

DISCUSSION

9. After careful review of the pleadings and the underlying facts, we will grant the Application for Review. Although we affirm the staff *MO&O* insofar as it revised the methods for calculating coverage areas in allotment proceedings, we conclude that because of intervening allotment actions the Athens upgrade would not provide second aural service in any region in WXTQ-FM's gain area. Therefore, we have examined the conflicting proposals under priority four of our allotment criteria, and conclude that the Greenup upgrade would better serve the public interest. We discuss the standards governing our decision and the factual basis for the decision below.

Service Area Comparisons

10. We decline to interpret *Roanoke Rapids* as requiring adherence to the particular criteria used in 1967 without regard to intervening events. Such interpretation could lead to anomalous and unreasonable results. In the present case, the staff assumed a 1.0 mV/m signal strength contour for determining FM service coverage and assumed maximum facilities for all but full Class C stations. Although this model differs from that used by the Commission in *Roanoke Rapids*, we find the staff's assumptions to be reasonable and to provide for uniformity and certainty in service area calculations. Consequently, we affirm the validity of the "reasonable facilities" principle first set forth in *Roanoke Rapids* and the staff's application of that principle to the present case. We note, however, that we recently raised the maximum ERP for Class A stations from 3 kW to 6 kW. *See Second Report and Order* in MM Docket No. 88-375, 4 FCC Rcd 6375 (1989), *recon. pending*. Although many Class A stations will be able to take advantage of this power increase, a significant number will not be able to do so because of interstation spacing constraints. Therefore, we modify the staff's assumptions to include a presumption that the coverage for Class A stations would be determined by the greater of either actual facilities or facilities of 3 kW ERP at 100 meters HAAT. To the extent that *Roanoke Rapids* can be read to require the Commission to use particular levels of facilities for purposes of analyzing allotment requests as "reasonable facilities", we hereby overrule that aspect of *Roanoke Rapids* for the reasons set forth herein.

Allotments Considered

11. We reiterate the general principle implicit in *Roanoke Rapids* that, in determining whether an FM allotment would provide first or second aural service, the Commission should normally assume that service will be provided on existing vacant allotments. We conclude that both the new allotment at McArthur, Ohio, and the upgrade of Station WKOV-FM at Wellston, Ohio, would provide full-time aural service to the area that the staff concluded in its *R&O* would receive a second full-time aural service from the proposed Athens upgrade. We do not address WATH's contention that the allotment at McArthur should be disregarded, since the Wellston upgrade alone is sufficient to obviate any claim by WATH that it provides a second full-time aural service.[12]

Comparison of the Upgrades

12. GCB's proposal would serve a greater number of persons within its gain area (93,363) than would WATH's (58,561). *See* Appendix A. GCB's population advantage of approximately 35,000 represents 59.4% more persons. Considered on this basis alone, GCB's proposal would best serve the public interest. If WATH had not submitted information in an attempt to establish that its proposed upgrade, while serving a smaller total population, would serve a population generally receiving fewer aural services than the population within GCB's gain area, our inquiry would end and GCB's proposal would be granted. WATH did submit such information, however. We agree with WATH's general contention that such evidence, when submitted in rebuttal, could mitigate or outweigh a population advantage. Our analysis of the relevant facts as set forth below shows that the information submitted by WATH does not rebut the presumption.

13. To evaluate the two mutually exclusive upgrade proposals, we compared the number of persons within the gain area of each proposal, while taking into account the number of full-time aural signals received within each area. Specifically, for each upgrade, we first isolated regions within each county division of the gain area according to the number of services received within each region or "pocket." Second, we calculated the number of persons within each of these "pockets."[13] Next, this raw population for each pocket was adjusted by dividing it by the number of services received to obtain a service value "index." By doing so, we "discount" the raw population total within a pocket as the number of services received increases. These service value indices, representing the adjusted or "discounted" population for each pocket, were then summed to arrive at an adjusted population or composite index for each county. *See* Appendix B. We summed the adjusted populations or indices for all of the counties within a given gain area to arrive at a composite service value index. Like the analysis we sometimes undertake in comparative hearing proceedings, this methodology considers both population served and services received. However, in a hearing context, we compare proposals on the basis of population totals, but use subjective weightings in order to discount them according to services received, *e.g.* a "substantial" preference accorded one proposal due to its overwhelming population advantage may be reduced to a "moderate" preference where the gain area having the population advantage receives significantly more services than the gain area of a competing proposal.[14] The method we employ here uses a concrete and far more objective basis for comparison. Moreover, the specific methods we used for discounting populations as the number of services received increases is consistent with our general assumption of rapidly diminishing value to consumers of each additional radio signal. Although there may be other methods that would value additional service either more or less highly, we believe the particular method we used strikes an appropriate balance, based upon our longstanding commitments, on the one hand, to fostering diversity, and, on the other hand, to fostering service to lightly served areas. The end result of this method is that each upgrade proposal has a numerical index of its value, which fosters greater precision in the comparison of competing proposals under the fourth of our allotment priorities.

14. Using this methodology, and considering all full-time aural services including nighttime AM services, the service value index for the Greenup gain area is 11,335 versus WATH's index of 9540. This represents an 18.8% difference in GCB's favor, which, though less than the 59.4% difference in GCB's favor in raw population, we find to be dispositive. Therefore, we conclude that GCB's proposal is superior, and that the public interest will be better served by the upgrade of Station WLGC-FM at Greenup.[15]

15. In summary, we uphold the principle set forth in *Roanoke Rapids* that in calculating coverage or potential coverage from an allotment, we should assume the use of "reasonable facilities." We also conclude that the specific depiction of what constitutes "reasonable facilities" is not a static model, but one that changes with time as the service evolves. Therefore, while we will continue, consistent with our 1967 decision in *Roanoke Rapids*, to use the 1.0 mV/m contour as the basis for coverage determinations for all classes of FM stations, we depart from *Roanoke Rapids* by assuming the use of maximum facilities on all but Class C and Class A allotments. Finally, we conclude that when comparing upgrade proposals under priority four, other public interest matters, we will first consider simple net differences in the number of persons newly served by each proposal. A petitioner will be allowed to make a showing that discounts the raw population totals in proportion to the number of services available in the proposed service areas. To make such showing, a petitioner should use the methods we used in evaluating the proposals in this proceeding.

16. Accordingly, pursuant to authority contained in Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r) and 307(b), IT IS ORDERED That effective **April 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Rules IS AMENDED with respect to the following communities:

City	Channel No.
Greenup, Kentucky	289B1
Athens, Ohio	282A, 288A

17. IT IS FURTHER ORDERED That, pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of WLGC-FM, Greenup, Kentucky, IS MODIFIED, to specify operation on Channel 289B1 in lieu of Channel 288A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Memorandum Opinion and Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

18. IT IS FURTHER ORDERED That the Motion to Strike filed by Greenup County Broadcasting, Inc. IS DENIED.

19. IT IS FURTHER ORDERED That the Motion for Stay filed by Greenup County Broadcasting, Inc. IS DISMISSED AS MOOT.

20. IT IS FURTHER ORDERED That the Application for Review filed by Greenup County Broadcasting, Inc. IS GRANTED.

21. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

The following are summaries of the populations of the counties within the predicted gain areas of Class B1 service contours proposed for Station WLGC-FM, Greenup, Kentucky; and within the predicted gain areas of Class B1 service contours proposed for Station WXTQ-FM, Athens, Ohio. Both stations are currently licensed to operate on Channel 288A.

WLGC-FM, Greenup, Kentucky

Kentucky Counties

Greenup (increase from 97% to 100%) population 39,132:

city of Flatwoods, pop. 8354, excluded, already within Class A service contour, (39,132 - 8354) x 3% = *923*.

Boyd (incr. from 25% to 80%) pop. 55,513:

cities of Ashland, pop. 27,064, and Westwood, pop. 5973, both excluded, w/i Class A service contour, (55,513 - 27,064 - 5973) x 55% = *12,362*.

Carter (incr. from 5% to 45%) pop. 25,060 x 40% = *10,024*.

Lewis (incr. from 10% to 30%) pop. 14,545 x 20% = *2909*.

Ohio Counties

Adams (incr. from 0% to 1%) pop. 24,328 x 1% = *243*.

Scioto (incr. from 25% to 80%) pop. 84,545:

city of Portsmouth, pop. 25,943, excluded, w/i Class A service contour, (84,545 - 25,943) x 55% = *32,231*.

Pike (incr. from 0% to 2%) pop. 22,802:

city of Waverly, pop. 4603, excluded, not covered by upgrade (22,802 - 4603) x 2% = *364*.

Jackson (incr. from 0% to 15%) pop. 30,592:

cities of Jackson, pop. 6675, and Wellston, pop. 6016, both excluded, not covered by upgrade, (30,592 - 6675 - 6016) x 15% = *2685*.

Gallia (incr. from 0% to 15%) pop. 30,098:

city of Gallipolis, pop. 5576, excluded, not covered by upgrade, (30,098 - 5576) x 15% = *3678*.

Lawrence (incr. from 30% to 80%) pop. 63,849:

city of Ironton, pop. 14,290, excluded, already w/i Class A service contour, (63,849 - 14,290) x 50% = *24,780*.

West Virginia Counties

Cabell (increase from 0% to 2%) population 106,835:

city of Huntington, pop. 63,684, excluded, not covered by upgrade, (106,835 - 63,835) x 2% = *863*.

Wayne (incr. from 0% to 5%) pop. 46,021 x 5% = *2301*.

APPLICABLE POPULATION TOTALS for KY/OH/WV Counties = *93,363*.

WXTQ-FM, Athens, Ohio

Ohio Counties

Athens (incr. from 90% to 100%) pop. 56,399:

city of Athens, pop. 19,743, excluded, already within Class A service contour, (56,399 - 19,743) x 10% = *3666*.

Morgan (incr. from 15% to 40%) pop. 14,241 x 25% = *3560*.

Washington (incr. from 3% to 20%) pop. 64,266:

city of Marietta, pop. 16,467, excluded, not covered by upgrade, (64,266 - 16,467) x 17% = *8126*.

Meigs (incr. from 15% to 80%) pop. 23,641 x 65% = *15,367*.

Gallia (incr. from 0% to 3%) pop. 30,098:

Gallipolis, pop. 5576, excluded, not covered by upgrade, (30,098 - 5576) x 3% = *736*.

Jackson (incr. from 0% to 10%) pop. 30,592:

cities of Jackson, pop. 6675, and Wellston, pop. 6016, both excluded, not covered by upgrade, (30,592 - 6675 - 6016) x 10% = *1826*.

Vinton (incr. from 10% to 80%) pop. 11,584 x 70% = *8109*.

Hocking (from 20% to 70%) pop. 24,304:

city of Logan, pop. 6557, excluded, not covered by upgrade, (24,304 - 6557) x 50% = *8874*.

Perry (from 5% to 35%) pop. 31,032:

city of New Lexington, pop. 5179, excluded, not covered by upgrade, (31,032 - 5179) x 30% = *7756*.

West Virginia County

Mason (incr. 0% to 2%) pop. 27,045 x 2% = *541*.

APPLICABLE POPULATION TOTALS for OH/WV Counties: *58,561*.

APPENDIX B

An example for one county in WLGC-FM's expanded service area, showing how we determined the population-service index for each county subdivision:

Station *WLGC - FM*

Population in Gain Area *3678*
County *Gallia, OH*

Pop. Pocket	% of Gain Area	Services	Pop.	# of Services*	Pop/Svc Index
1	20	WPAY(CP), WRVC, Allot. (S. Webster), WKEE, WTCR, WEMM, WYPC, WKOV, WCJO, WLW(AM)	736	11	67
2	50	Same as pocket 1 - WKOV - WCJO	1839	9	204
3	14	Same as pocket 2 - Allot. (S. Webster)	515	8	64
4	7	Same as pocket 3 + WKLC	257	9	29
5	9	Same as pocket 4 - WLW(AM)	331	8	41
	100%		3678		405, population service index for this county's gain area

* # of services includes service from proposed upgrade

FOOTNOTES

[1] GCB filed a motion to strike that portion of WATH's opposition that argues for the use of "the comparative hearing model" in lieu of reliance on absolute population gains in reaching a decision in this case. WATH filed a "Motion to Strike as Untimely GCB's Motion to Strike or in the Alternative, Opposition to Motion to Strike" and GCB filed an "Opposition to Motion to Strike as Untimely, Etc." GCB requests that we strike matters raised in WATH's opposition because they allegedly were not relevant to the matters raised in GCB's Application for Review. We will deny GCB's motion. The material in WATH's opposition is sufficiently encompassed by the matters raised in GCB's Application for Review to warrant consideration.

GCB later filed a motion to stay the effective date of the *MO&O*. Given our disposition of this case, we will dismiss GCB's motion as moot.

[2] Neither party claimed that its upgrade would fulfill priority 1 by providing a first aural service. Further, because each station already provides service to its community of license, neither proposal would provide a first local service. Therefore, neither proposal met priority 3.

[3] The staff estimated the extent of penetration of the predicted Class B1 contours into county divisions not included in the coverage of the Class A contours. That penetration, expressed as a percentage of a county's land area, was applied to the total population of the county to determine how many persons theoretically would benefit from the new service. Populations within each county were assumed to be uniformly distributed. To prevent anomalous results, high density population centers such as identifiable communities located outside the predicted Class B1 service contour of the station or located within the Class A contour were excluded from the county population totals prior to performing the calculations.

[4] For each class of station, the Commission has established a set of maximum facilities, *i.e* a maximum effective radiated power ("ERP") and a reference antenna height above average terrain ("HAAT"). The reference antenna height may be exceeded if the ERP is reduced such that the distance to the station's 1.0 mV/m contour does not exceed what it would be were the station to operate with maximum ERP at the reference HAAT. *See* 47 CFR §73.211.

[5] *See Third Report and Order* in Docket 17095, 9 FCC 2d 672 (1967), and *Further Notice of Proposed Rule Making*, FCC 67-665, 32 Fed. Reg. 8530 (June 14, 1967) in that docket (explaining certain assumptions underlying the standards for evaluating coverage areas adopted in the *Third Report and Order)*.

[6] The Commission has since created a Class C3 for FM stations. *See First Report & Order* in MM Docket 88-375, 4 FCC Rcd 2d 2792 (1989).

[7] The staff made an exception from its general assumption of maximum facilities, however, for Class C stations. To determine the extent of a Class C station's service, the Commission uses the Class C ERP of 100 kW (except in those rare instances in which a Class C station must reduce its power because its HAAT is greater than the reference HAAT for Class C (600 meters), in which case the Commission uses the actual ERP) and either the authorized HAAT for existing stations or the Class C minimum HAAT of 300 meters for vacant allotments. This departure from the general assumption of maximum facilities is justified by FAA constraints, local zoning ordinances, and cost considerations that often prevent the construction of tall antenna towers necessary to exceed the Class C minimum HAAT.

[8] In FM allotment proceedings, a gray area is a geographical region served by only 1 full-time aural service. A region not served by any full-time aural service is referred to as a "white" area.

[9] GCB refers to a rule making petition that was granted by *Report and Order* in MM Docket No. 88-610, DA 89-1092, released September 27, 1989. The coverage of a station operating from that allotment's reference coordinates would place a signal over the area identified in the *MO & O* as a gray area.

[10] GCB also submitted an engineering study to support its position. The study, which generally uses assumptions most favorable to WATH's claim of second aural service, demonstrates that the changes at Wellston and McArthur will completely obviate WATH's claim that its upgrade would provide a second aural service.

[11] In WATH's petition for reconsideration, it makes an unrebutted claim that only 48.8% of the gain area of its Station WXTQ-FM would receive more than 5 FM stations, whereas 84% of WLGC-FM's gain area would be well-served or receive more than 5 services. Moreover, WATH claims that the service provided by WXTQ-FM would constitute the 3rd, 4th, or 5th service in 51.2% of its gain area, whereas WLGC-FM's upgraded service would provide such service in only 15.2% of its gain area. We note that GCB did not consider AM service and assumed uniform population distribution. In any event, WATH's showing demonstrates that there may be a significant population difference between the two proposals in terms of the number of persons that would receive their 3rd, 4th, or 5th services.

[12] We also need not address the question of whether to examine WATH's claim of second aural service assuming the state of affairs in existence prior to adoption of the staff *R&O*, or the present state of affairs. In either case, the upgrade of WATH's Athens station would not provide second aural service.

[13] The estimate of population within each pocket is based on the population in the gain area of each county as calculated by our standard method for estimating gain area populations set out in n. 3, *supra*. The specific calculation of population in each pocket is accomplished by estimating the percentage each pocket represents of the whole county gain area, and, assuming uniform distribution of population, applying this percentage to the county gain area population.

[14] In WATH's petition for reconsideration, it argued that because more than 5 services would be received in only about half of Station WXTQ-FM's gain area, compared with the receipt of more than 5 services in greater than 80% of Station WLGC-FM's gain area, WATH's proposal should be preferred. We show below that despite some reduction in WLGC-FM's advantage, it is still dispositive on the basis of an adjusted population total or composite service value index.

[15] The Greenup, Kentucky, allotment is made with a site restriction of 4.9 kilometers (3.0 miles) north of the city, at coordinates N 38-37-24 and W 82-49-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-524

In re Applications of

WILLIE A. JEFFERSON d/b/a OPPORTUNITY BROADCASTING OF SHREVEPORT	File No. BPH-870814MK
NTW, INC.	File No. BPH-870820ME
PORT CITY COMMUNICATIONS L.P.	File No. BPH-870820MH
INNOVATIVE WOMEN'S MEDIA ASSOCIATION	File No. BPH-870820MQ
CADDO BROADCASTING LIMITED PARTNERSHIP	File No. BPH-870820MR

For Construction Permit for
New FM Station, Channel 275C2,
Shreveport, Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: February 26, 1991; Released: March 12, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The four unsuccessful applicants here have filed exceptions to the *Initial Decision*, 5 FCC Rcd 2601 (1990) (I.D.), of Administrative Law Judge Edward Luton (ALJ), which concluded that the comparatively superior application was Innovative Women's Media Association (Innovative). Oral argument was held November 2, 1990. Our Decision in another case, *Texas Communications Limited Partnership*, 5 FCC Rcd 5876 (1990), *recon. denied*, FCC 91R-16, released February 27, 1991, and a series of pleadings that were filed in this case, have given rise to substantial and material questions of fact regarding Innovative's financial and other basic qualifications.

BACKGROUND

2. Kent S. Foster holds a 45% equity interest in Innovative's partnership, I.D., para. 46, although apparently he has provided the principal financial backing for that applicant since it filed its application in August 1987. *See* paras. 5-6, below. The same Foster was also a limited partner in *Texas Communications*, *supra*, 5 FCC Rcd at 5877, where the Board found that CHM Broadcasting (CHM) was dependent for its financial qualifications on Foster. There, as here, the applicant was relying, in part, on a bank loan commitment from the East Texas State Bank, which was owned, operated, and controlled by both Foster and his brother-in-law. However, that institution failed in November 1988.

3. The hearing in *Texas Communications* sought to ascertain whether CHM falsely certified that it was financially qualified, and whether, in fact, CHM was financially qualified to construct and operate its proposed station. After reviewing the record, the Board disqualified CHM on the financial qualifications issue, but held that we did not have to reach "the more subjective question of whether there also existed a 'conscious intent to deceive' when the applicant certified it was financially qualified," 5 FCC Rcd at 5877; nor did the Board have to decide whether Foster, because he voted a controlling interest in the East Texas State Bank, and had reviewed a recent audit of that Bank, knew, or should have known, that the Bank was in serious financial difficulties when it secured the loan letter which it submitted to the Commission.

4. Innovative's application was filed on August 20, 1987, some 40 days after CHM's application was filed. No financial issue was designated against Innovative. Martha M. Boone, a managing partner, did submit a verified statement which indicated that the original financial certification was based upon: "a letter of reasonable assurance from the East Texas State Bank. The amount of the loan contemplated by that letter exceeded our budget for construction costs plus three months' operating expenses by $131,042." Statement Under Penalty of Perjury, dated July 3, 1989. The amount of this loan was redacted from the Bank Letter which was attached to Moore's Statement, but the letter did contain a notation: "cc.: Kent Foster." Thus, here, as in *Texas Communications*, it appears that Innovative's finances were based upon a loan letter from Foster's family bank (which shortly thereafter failed).

5. The facts are further complicated here because it appears that at the time Moore certified to Innovative's financial qualifications, Foster may have been the undisclosed principal financial backer of the application. The findings in the I.D. (at para. 47) establish that:

> . . . on August 20, 1987, Michele Krajicek was the sole limited partner. (NTW Ex. 7). She contributed $5,000 in capital, in proportion to her then 50% equity share. (Tr. 1367). By an agreement dated September 20, 1987, Krajicek purported to transfer 90% of her limited partnership interest to Mr. Kent S. Foster. (NTW Ex. 13; Tr. 778-80). Neither Mr. Foster nor Ms. Krajicek informed the general partners of this purported agreement. Innovative's partnership agreement specifically prohibits the sale or transfer of any general or limited partnership interest until two years after an FCC license is issued to the partnership. (NTW Ex. 7).

Innovative also acknowledges that as early as September of 1987:

> . . . at her request, Mr. Foster gave Ms. Krajicek two checks, one for local counsel and one for communications counsel. (Inn. Ex. 8A, p. 22; Inn. Ex. 9A, p. 12-13, 15.) At that time, Innovative did not have its own checking account, and its expenses were paid through the account of its local attorney. (Tr. 935, 1007-1008, Inn. Ex. 15.) Mr. Foster provided no further funds until he was admitted to the partnership. (Inn. Ex. 9A, p. 16- 20, Tr. 939-942, NTW Ex. 12.) The one check he did draw in this period was drawn from a joint account with Ms. Krajicek. (Inn. Ex. 9A, p. 18-19.)

Opposition to NTW Motion to Enlarge, p. 3.

6. Moreover, Innovative's original partnership agreement obligated the limited partners to furnish $150,000 for prosecution expenses and to secure a letter of credit from "a solvent bank" for the other expenses. NTW Exhibit 7, p. 3. The record does not show whether the managing partners ascertained the limited partner's financial resources before financial certification. Foster did advance some $98,600 of the prosecution expenses (Innovative Ex. 9, p. 30), and one of the competitors points out that: "Foster paid Innovative legal bills directly even when he was not a limited partner." Brief of Port City Communications L.P., pp. 7-8.

7. Further clouding the factual picture is the record in *Texas Communications*, which established that by August 1989, Foster had broadcast investments in some 13 FM applications. Innovative was Foster's *tenth* FM application, for which he was obliged to provide $600,000. (CHM Ex. 4, Ex. E pp. 1-2). Further, CHM's exhibit did not indicate that Foster was also involved in at least three other common carrier applications. No showing was made as to his obligations, if any, to those or other multi-million dollar common carrier applications during the same period of time. Foster did seek financial credit for the value of the common carrier cellular construction permits, but did not provide documentation from a qualified appraiser. *See Opal Chadwell*, FCC 88I-045, released May 5, 1988; *Christian Children's Network*, 101 FCC 2d 612, 614 (1985)(formal appraisals of real estate and cable systems required).

DISCUSSION

8. When Innovative filed its application, the Commission's financial certification standard required that an applicant must have reasonable assurance of having sufficient funds to construct the proposed station and operate it without revenue for three months before the applicant certifies its financial qualifications. In other words, the applicant may not certify its financial qualifications and then arrange financing. *See Northampton Media Associates*, 4 FCC Rcd 5517, 5518 (1989). *See also Aspen FM, Inc.*, 5 FCC Rcd 3196, 3198 (Rev. Bd. 1990); *Shawn Phalen*, 5 FCC Rcd 2622 (Rev. Bd. 1990). Controlling precedent also required that where an applicant has filed multiple applications before the Commission:

> [I]t must be able to demonstrate that it is financially qualified as to all pending applications. *See George Edward Gunter*, 104 FCC 2d 1363 (Rev. Bd. 1986); *Welch Communications, Inc.*, 5 FCC Rcd 4850 (Rev. Bd. 1990). *See also Public Notice on Matter of Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits*, 2 FCC Rcd 2122 (1987)(advising applicants that processing staff may question validity of the applicant's financial certification where applicant has large number of pending broadcast applications).

See Texas Communications, 5 FCC Rcd at 5878. In *Breeze Broadcasting Co.*, 5 FCC Rcd 6365, (Rev. Bd. 1990), an applicant had filed multiple applications with the Commission, including traditional broadcast facilities, as well as LPTV stations and common carrier cellular radio systems. After reviewing applicable Commission precedent, we held that: "a broadcast applicant cannot be considered to be financially qualified if it cannot demonstrate its financial qualifications to build contemporaneously the facilities proposed in parallel FCC applications." 5 FCC Rcd at 6366.

9. Based upon *Texas Communications*, NTW, Inc. urges the Board to apply the doctrine of collateral estoppel and to "hold that Innovative must be disqualified for lack of financial qualifications." Motion of NTW, Inc. to Enlarge Issues, filed October 30, 1990, pp. 6-7. Innovative responds that: "Foster has more adequate resources personally to finance Innovative's construction and initial operation. Collateral estoppel does not bar Innovative from making this showing." Opposition to NTW's Motion to Enlarge, p. iii. Collateral estoppel requires:

> (1) an issue identical to one that was previously litigated and that was essential to the previous decision;
>
> (2) the prior adjudication must have reached the stage of being a final judgment on the merits;
>
> (3) the party to be estopped must have been a party to the prior litigation, or in privity with such a party;
>
> (4) the estopped party must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Imagists, 4 FCC Rcd 3749, 3750 (Rev. Bd. 1989). Applying those criteria here, Innovative was not a party to *Texas Communications* nor was its financial qualifications in issue here; nor was there an issue or finding that Foster was the real-party-in-interest in control, either in *Texas Communications*, or here. *See, e.g., Ocean Pines LPB Broadcast Corp.*, 5 FCC Rcd 5821 (Rev. Bd. 1990). Thus, there has not been a full and fair opportunity to litigate the relevant issues in a prior proceeding and collateral estoppel is not applicable.

10. Even though this doctrine is not applicable here, the record in this case, and Foster's own showing in *Texas Communications*, does raise substantial and material questions of fact regarding Innovative's basic qualifications which require further hearing. The first issue concerns the foundation for, and accuracy of, Innovative's original financial certification based upon the letter from the East Texas Bank. A copy of that letter was sent to Foster, but Moore's statement does not indicate what Foster's role was in obtaining its financing. Foster's close ties to this applicant and the Bank give rise to the question whether or not he was aware of the financially precarious condition of the Bank. That question was not finally resolved in *Texas Communications*, and does bear on the validity of the financial certification in this case.

11. A second aspect of this issue concerns Innovative's contention that it is nonetheless financially qualified, based upon Foster's own resources, in the event the bank letter is found to be invalid. We have agreed with Innovative that it should not be collaterally estopped from showing that Foster has the resources to finance this proposal, assuming Innovative had an alternative financing plan from the outset of relying solely on a loan from Foster. CHM had such an alternative plan in *Texas Communications*. Our decision there, however, focused only upon CHM's qualification based upon its most recent showing in that record, rather than at the time of certification. Here, no financial issue was designated against Innovative, and it has not had a full and fair opportunity to meet that issue.

12. Innovative argues that a financial issue is not necessary because in *Texas Communications*, the Board underestimated Foster's assets, and overstated his obligations. In this regard, it has proffered several additional declarations and new legal arguments to bolster and buttress its position for recognition of Foster's alleged illiquid assets, including certain Cayman Island assets, *id.*, at pp. 7-8; the Baton Rouge, Louisiana, non-wireline cellular system, *id.*, at 8-9; and notes receivable, *id.*, at 9. These assets were not credited in *Texas Communications* because CHM failed to fully document their existence, or to legally establish that they were recognizable under relevant Commission precedent. On reconsideration in *Texas Communications*, FCC 91R-16, *supra*, we did slightly modify the amount of Foster's FM obligations after new counsel clarified the existing record regarding that matter. Here, we will not foreclose Innovative from fully justifying its case on remand on a newly designated financial issue. We remind Innovative, however, that much of the difficulty in ascertaining whether CHM was financially qualified in *Texas Communications*, or Innovative in the instant case, is caused by the fact that Foster has been proposing to fund a large number of broadcast and other communications applications over an extended period of time. Given that an applicant must demonstrate the financial wherewithal to fund all parallel applications, *see Breeze Broadcasting Co.*, *supra*, the instant inquiry involves a dynamic record, requiring scrutiny of Foster's assets, liabilities, and obligations for all significant time events. Thus, the applicant must show that it was financially qualified: (1) at the time it certified to its qualifications; and (2) at each time a new pending application relying on Foster's funds was filed. In ascertaining the amount of Foster's illiquid but readily convertible assets, the purported assets must be accompanied by formal appraisals.

13. A second issue relates to Foster's status to the applicant. The record indicates that Foster may have been involved in securing the August 20, 1987 bank letter; that within 30 days thereafter, he began to pay the substantial legal bills of local and communications counsel; that he acquired 90% of the limited partnership equity without the knowledge of the general partners; and that he has advanced nearly $100,000 for prosecution expenses. We will therefore designate an issue to ascertain whether Foster was a real-party-in-interest to this application, and used Ms. Krajieck, a personal friend, to achieve his objectives. *See Ocean Pines LPB*, *supra*.

14. NTW also seeks the designation of an issue regarding "the accuracy and candor of financial representations made by Foster to and through various broadcast, cellular and satellite applications." The issues we are remanding for further hearing are sufficiently broad to permit full exploration of the accuracy of Innovative Women's financial showing to the extent that it relied upon Foster's resources. If, during the further hearing, the presiding officer concludes that Foster's financial representations have been less than candid, he is, of course, fully empowered to add appropriate issues.

15. Finally, Innovative has also sought leave to amend to substitute a new commitment letter. At this stage of the case, we will deny the petition because if Innovative "lacked reasonable assurance of financial qualifications at the time of certification, it cannot rely on a later bank letter to support the earlier certification." *Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5751 (1990), *supra*.

16. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed September 28, and December 5, 1990 by Innovative Women's Media Association ARE DENIED; and IT IS FURTHER ORDERED That the motion of NTW, Inc., to enlarge issues and to grant other relief as appropriate filed October 30, 1990 IS GRANTED to the extent that this proceeding IS REMANDED to the presiding judge for further hearing and the preparation of a Supplemental Initial Decision on the following issues:

To determine whether Kent S. Foster is a real-party-in-interest to the application of Innovative Women's Media Association;

To determine whether Innovative Women's Media Association is financially qualified to be a Commission licensee;

To determine whether Innovative Women's Media Association falsely certified its financial qualifications and, if so, the effect thereof on its qualifications to be a Commission licensee.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-446

In the Matter of

Amendment of Section 73.202(b), RM-7082
Table of Allotments,
FM Broadcast Stations.
(Key Largo, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 28, 1991; Released: March 12, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5964 (1990), issued in response to a petition for rule making filed by Spanish Broadcasting System of Florida, Inc. ("petitioner"), permittee of Station WZMQ, Channel 280A, Key Largo, Florida, proposing the substitution of Channel 280C2 for Channel 280A at Key Largo and modification of its construction permit to specify the higher powered channel. Petitioner filed comments restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 280C2 for Channel 280A at Key Largo, since it could provide a wide coverage area FM service to the community. Channel 280C2 can be allotted to Key Largo in compliance with the Commission's minimum distance separation requirements, with a site restriction of 20.3 kilometers (12.6 miles) southwest of the community to accommodate petitioner's proposed site.[1] We will modify the construction permit of Station WZMQ(FM) to specify operation on Channel 280C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 26, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Key Largo, Florida	280C2

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Station WZMQ(FM), Key Largo, Florida, IS MODIFIED, to specify operation on Channel 280C2 in lieu of Channel 280A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates are North Latitude 24-57-20 and West Longitude 80-34-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-554

In the Matter of

Amendment of Section 73.202(b), RM-7442
Table of Allotments,
FM Broadcast Stations.
(Littlefield, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 28, 1991; Released: March 12, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6968 (1990), issued in response to a petition filed by Stebbins Broadcasting Company ("petitioner"), proposing the substitution of FM Channel 238C3 for Channel 238A at Littlefield, Texas, and the modification of the construction permit for Station KXDM at Littlefield to specify the higher powered channel. Petitioner filed comments in support of the proposal stating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 238C3 for Channel 238A at Littlefield, Texas, since it could provide the community with a wide coverage area FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at the site specified by the petitioner.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 26, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Littlefield, Texas	238C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Stebbins Broadcasting Company for Station KXDM, Littlefield, Texas, IS MODIFIED to specify operation on Channel 238C3, in lieu of Channel 238A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 238C3 at Littlefield are North Latitude 33-56-17 and West Longitude 102-20-38.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-386

In the Matter of

Amendment of Section 73.202(b), RM-7276
Table of Allotments,
FM Broadcast Stations.
(Pullman, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 28, 1991; Released: March 12, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5282 (1990), issued in response to a petition filed by Palouse Empire Broadcasting Corp. ("petitioner")[1] proposing the substitution of FM Channel 258C1 for Channel 258C2 at Pullman, Washington, and the modification of its construction permit for Station KZZL-FM at Pullman to specify operation on the higher powered channel. Petitioner filed comments in support of the proposal restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 258C1 for Channel 258C2 at Pullman, Washington, since it could provide the community with a wider coverage area FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules with a site restriction of 16.8 kilometers (10.4 miles) east of Pullman to avoid a short-spacing to Station KKZX(FM), Channel 255C, Spokane, Washington.[2] Concurrence of the Canadian government has been obtained, since Pullman is located within 320 kilometers (200 miles) of the U.S.-Canadian border. In accordance with Section 1.420(g) of the Commission's Rules, we will also modify petitioner's construction permit for Station KZZL-FM at Pullman to specify operation on Channel 258C1.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 26, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Pullman, Washington	258C1, 282C1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Palouse Empire Broadcasting Corp. for Station KZZL-FM IS MODIFIED to specify operation on Channel 258C1, in lieu of Channel 258C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The petition for Rule Making was originally submitted by P-N-P Broadcasting, Inc. The permit has been transferred to Palouse Empire Broadcasting Corp., with P-N-P Broadcasting, Inc., remaining the majority stockholder.

[2] The coordinates for Channel 258C1 at Pullman are North Latitude 46-40-32 and West Longitude 116-58-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-614

In the Matter of

Amendment of Section 73.202(b), RM-7136
Table of Allotments,
FM Broadcast Stations.
(Brookston and Monticello, Indiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 28, 1991; Released: March 12, 1991

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 139 (1990), proposing the reallotment of FM Channel 237A from Monticello to Brookston, Indiana, and modification of the license of WKJM, Inc. ("WKJM"),[1] for Station WKJM(FM), Channel 237A, accordingly, pursuant to Commission Rule 1.420(i). WKJM submitted late-filed comments.[2]

2. We believe that the public interest would be served by realloting FM Channel 237A from Monticello to Brookston. Petitioner has demonstrated that the reallotment proposal would result in a preferential arrangement of allotments since Brookston (pop. 1,709) [3] would receive its first local broadcast service. Additionally, this action will not deprive Monticello (pop. 5,162) of local service as Station WMRS(FM), Channel 299A, is licensed to Monticello.

3. Channel 237A can be allotted to Brookston at the petitioner's current transmitter site consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, as Station WKJM(FM) currently places a 70 dBu signal over the entire community of Brookston.[4] In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will modify the license for Station WKJM(FM) to specify Brookston, Indiana as its community of license on Channel 237A, in lieu of its present use at Monticello, Indiana.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 26, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Brookston, Indiana	237A
Monticello, Indiana	299A

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of WKJM, Inc. (File No. BLH-870114KC) for Station WKJM(FM) IS MODIFIED to specify operation on Channel 237A at Brookston, Indiana, in lieu of Monticello, Indiana, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the license (BLH-870114KC) except the community, as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301); and

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with its license (BLH-870114KC) except for the community as specified above and a license application (Form FCC 302) is filed within ten (10) days of commencement of program tests.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] At the time this proposal was filed, Nu-View Associates, Inc. ("Nu-View") was the licensee of Station WKJM(FM). An assignment of the license to WKJM (BALH-891207HW) was subsequently granted January 30, 1990 and consummated January 31, 1990.

[2] These comments, which advise of the recent assignment of license of Station WKJM(FM) from Nu-View to WJKM, were accompanied by a motion to accept. Although the Commission's Rules do not contemplate the filing of pleadings beyond the comment period unless specifically requested, in this instance the comments reaffirm WKJM's continuing interest in pursuing the modification proposal initiated by Nu-View. No other comments were filed. Therefore, no prejudice will result from acceptance of the comments.

[3] Population figures are from the 1980 U.S. Census.

[4] Coordinates at the licensed site of Station WKJM(FM) are 40-40-57 and 86-51-34.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 12, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON AMENDMENT TO AT&T'S COMPARABLY EFFICIENT INTERCONNECTION PLAN FOR ENHANCED SERVICES COMPLEX

On February 13, 1991, the American Telephone and Telegraph Company (AT&T) filed an amendment to its comparably efficient interconnection (CEI) plan for its Enhanced Services Complex (ESC). AT&T's ESC is an enhanced service architecture that allows AT&T to offer various enhanced voice and data services using equipment located in AT&T's central office. *See AT&T Plan for Enhanced Services Complex*, 4 FCC Rcd 6974 (1989), *Amendment to AT&T's Plan for Enhanced Services Complex*, 6 FCC Rcd 357 (1991). AT&T proposes to expand its current offering to permit users of the ESC to make calls to third parties without disconnecting from the ESC.

AT&T states that the Interactive Voice Services (IVS) offered through the ESC allow users to leave voice messages for later delivery to third parties; to interact with information databases outside of the ESC; and to be routed to attendants on the premises of information providers outside of the ESC. AT&T states, however, that its existing offering does not permit users to respond to messages received through the IVS voice messaging service by returning calls to third parties without disconnection from the ESC. AT&T states that there is customer demand for this general outbound capability.

AT&T states that the new feature will only use those basic services described in its initial plan, and that interconnection with the ESC will be in the same manner as described in its plan. AT&T states that it will continue to satisfy the *Computer III* CEI requirements and the Commission's other non-structural safeguards in the manner described in its approved CEI plan for ESC.

Interested parties are to file comments on this amendment by **April 9, 1991,** and reply comments by **April 24, 1991,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20037. Copies of AT&T's amendment can be obtained from Downtown Copy Center at (202) 452-1422.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

LAS AMERICAS COMMUNICATIONS, INC. Newark, New Jersey	**MM DOCKET NO. 84-115** File No. BPH-821105AR
Frances Lawrence Antonin and Mary Garcia d/b/a ANTONIN & GARCIA Jersey City, New Jersey	**MM DOCKET NO. 84-123** File No. BPH-821108AQ
CAPRICE BROADCASTING GROUP, INC. Newark, New Jersey	**MM DOCKET NO. 84-125** File No. BPH-821108AS
COMSERV BROADCASTING GROUP, INC. Newark, New Jersey	**MM DOCKET NO. 84-128** File No. BPH-821108AV
MULTICULTURAL BROADCASTING, INC. Newark, New Jersey	**MM DOCKET NO. 84-131** File No. BPH-821108BE
OMNILINGUAL BROADCASTING, INC. Newark, New Jersey	**MM DOCKET NO. 84-137** File No. BPH-821108BK

For Construction Permit
for a New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: February 27, 1991; Released: March 13, 1991

By the Commission:

I. BACKGROUND

1. By its Order of February 26, 1990, the Commission approved a settlement agreement in the above-captioned case; denied petitions for leave to intervene filed by the interim licensee of Station WHBI, Global Broadcasting Group, and by Coalition of Concerned Newark Citizens; and dismissed as moot eight applications for review of a Review Board decision.[1] The settlement approved by the Commission granted Las Americas Communications, Inc.'s request to amend its application to specify Jersey City as the community of license, granted the amended application, and dismissed the five competing applications.[2]

2. Comserv and Multicultural, who agreed to dismiss their applications under the approved settlement, now claim that Las Americas has breached that agreement. Based on the alleged breach of contract, they request that the Commission rescind its approval of the agreement and return the above-captioned proceeding to active hearing status. Non-parties Global, Coalition, and The Committee to Preserve Multi-Ethnic and Multi-Lingual Programming, all of which object to moving the station from Newark to Jersey City, also seek reconsideration.

3. Having reviewed the pleadings before us, [3] we reaffirm our earlier determinations that approval of the agreement served the public interest, that Coalition and Global lack standing to intervene in this proceeding, and that the alleged absence on one occasion of Las Americas' public file from its designated repository was not potentially disqualifying. Nevertheless, those pleadings present new matters raising substantial and material questions of fact as to whether Las Americas is financially qualified and whether it lacked candor or made misrepresentations to the Commission concerning its financial qualifications and its compliance with 47 C.F.R. § 73.3526. We therefore set aside our approval of the settlement agreement and reinstate the other five applications for FM channel 290A, as well as the applications for review previously dismissed.

4. Based upon our consideration of the reinstated applications for review, we affirm Antonin & Garcia's disqualification on the candor issue, and Las Americas' selection as the superior applicant. Certain aspects of the Board's comparative analysis also merit brief comment. As there are unresolved issues as to Las Americas' basic qualifications, we must remand the proceeding to the ALJ for evidentiary hearings.

II. PETITIONS FOR RECONSIDERATION

5. *Committee*: We will dismiss for lack of standing Committee's petition for reconsideration and dismiss as moot the related stay request. Comprised of program producers and WHBI-FM listeners, Committee requests that approval of the settlement be conditioned on Las Americas' retaining Newark as its community of license and keeping the multilingual format currently offered on FM channel 290A. Although it earlier sought to file an *amicus* brief supporting that format, Committee is not a party to this case and does not seek to intervene at this time. It does not explain its inability to participate earlier[4] or state with particularity how its interests are adversely affected by the Commission's approval of the settlement agreement, as 47 C.F.R. § 1.106 requires when a non-party seeks reconsideration.

6. In any event, as to Committee's concern with the potential loss of the unique programming offered by the interim operator, licensees are generally afforded broad discretion in the choice of a format and there is no reason to depart from that general rule here. The Hearing Designation Order, consistent with established precedent,[5] explicitly precluded the interim operator from applying for permanent authority to operate on FM channel 290A. Thus, whether selected by settlement or as a result of the comparative process, the permanent licensee for WHBI will not be obliged to continue the format offered by the

interim operator. We therefore find that Committee has not demonstrated that it is adversely affected by approval of the settlement agreement.

7. *Comserv and Multicultural*: We will deny the petitions for reconsideration filed by Comserv and Multicultural. Alleging that Las Americas failed to deposit certain money in escrow within fourteen days of the Commission's approval of the settlement, Multicultural and Comserv request that we grant reconsideration, rescind our approval of the settlement and return this proceeding to hearing status. However, it is well established that contractual disputes are matters of private, not public, concern and that their resolution is best left to the local courts, rather than to the Commission.[6] Thus, Las Americas' alleged breach of the settlement is not a basis for granting reconsideration. But, as explained below, there are substantial and material questions as to Las Americas' basic qualifications. We therefore grant reconsideration on this basis.

8. *Coalition and Global*: We will dismiss in part and deny in part the petitions for reconsideration filed by Global and Coalition. The Commission properly denied their requests, made for the first time after submission of the settlement, to intervene in this proceeding. Neither had adequately shown good reason for its failure to participate at an earlier stage of the proceeding or shown how its participation would assist the Commission, as 47 C.F.R. § 1.223 of the rules requires. We therefore deny those portions of the petitions for reconsideration addressing the standing issue. Having failed to demonstrate a cognizable interest in this proceeding, Coalition and Global lack standing to seek reconsideration of anything other than the denial of their intervention requests. The balance of their petitions for reconsideration are therefore dismissed for lack of standing.

9. Nevertheless, as discussed below, the pleadings before us now raise substantial and material questions as to whether Las Americas lacked candor or made material misrepresentations concerning its compliance with section 73.3526 and its financial qualifications both before and after the 1989 settlement. These matters warrant further inquiry, because, as reflected below, Las Americas prevails under the standard comparative issue.

III. POST-DECISIONAL MATTERS

A. Public File Issue

10. Under section 73.3526, a broadcast applicant must maintain a local file to be available for public inspection. Any amendments, or proposed amendments to, the application must be placed in the file. In its April 26, 1990 Opposition to the petitions for reconsideration, Las Americas submitted a declaration under penalty of perjury from its president, L. Raul Bernard. The statement, dated April 26, 1990, averred that soon after Las Americas filed an application in November 1982, Bernard made arrangements for its public file to be located at the offices of F.O.C.U.S., 443 Broad Street in Newark; that the file was maintained for several years thereafter; that he arranged on several occasions for amendments to be added to the file; and that he took steps to have a new file placed at F.O.C.U.S. soon after learning, in February 1990, of the file's disappearance.

11. Bernard's April 26, 1990 declaration stated further that, in an effort to discover what happened to the missing file, he contacted the now-retired F.O.C.U.S. director, Jose Rosario, with whom he originally entrusted the file. Attached to the declaration is Rosario's February 20, 1990 letter confirming that Bernard did deposit the file at the F.O.C.U.S. offices, but that it was apparently destroyed by "a fire and floods at F.O.C.U.S. years later." In reply, petitioners submitted a letter from a Newark Fire Department official stating that the last recorded fire in the immediate vicinity of the F.O.C.U.S. offices occurred on May 5, 1982, a full six months before Las Americas filed its application. In the face of this apparent discrepancy, the General Counsel invited Las Americas to clarify "when the fire relied on by Las Americas occurred and how long the file was maintained at the F.O.C.U.S. office prior to its destruction."[7]

12. In response, Las Americas filed a pleading on June 21, 1990 stating that it had again contacted Rosario, who was unable to provide additional information as to when a fire occurred at F.O.C.U.S. Thus, Las Americas, who "regret[ted] the inaccuracy of its earlier report," urged that there was no evidence of an intent to mislead the Commission, and that it "undertook a good faith investigation of the disappearance of its public file." Response at 2. According to Las Americas, Raul Bernard, having no first-hand knowledge of when and under what circumstances the file disappeared, simply reported what he learned from Rosario. Las Americas further states that, when it was unable to learn any more from Rosario, "[i]t then made contact with other people who had worked at the office and, *after a search of the records, was informed* that a fire had occurred at the offices, but that the date of the fire was in the Spring of 1982" (emphasis added). *Id.*

13. However, attached to Global's October 11, 1990 Reply is a letter from F.O.C.U.S.' current director, Jose Morales, to Las Americas which undercuts its claim to have lacked first hand knowledge of these matters when it filed the April 26, 1990 pleading. Not disclosed in either Las Americas' April 26, 1990 Opposition or its June 21, 1990 Response, Morales' February 13, 1990 letter alerted Las Americas to the possibility that the public file was lost either in "a big fire in 1982" or "a large flood in the basement where old records were stored." In other words, when Las Americas filed its April 26, 1990 Opposition (with Bernard's declaration and the attached letter from Rosario), it knew from Morales' February 13, 1990 letter (i.e. before it filed the April 26, 1990 Opposition) that the fire had occurred in 1982, not "years later," as claimed in the April 26, 1990 Opposition. This contradicts the representation in Las Americas' June 21, 1990 pleading that Bernard had simply relied on Rosario's suggestion that the file was destroyed by fire "years later." By concealing the Morales letter, which referred to a "big fire in 1982," Las Americas also created the misleading impression that it first learned the date of the fire when it received Global's reply.

14. Las Americas' apparent lack of candor as to this matter is compounded by statements in its October 1, 1990 Response. To refute the inference that it never had a public file, Las Americas submits declarations under penalty of perjury from Las Americas stockholder Luis Rodriguez and Luz Miriam Hernandez Sanchez (a Hispanic community leader), stating that they accompanied Raul Bernard when he first deposited the public file at the F.O.C.U.S. office in 1982. It also submits an undated letter from Raul Bernard to Rosario directing him to put certain materials "into the files of the previous [application], which is at your office." Although Las Americas

thus continues to claim that Bernard's April 26, 1990 declaration simply "report[ed] faithfully what those who are in a better position to know have told him," Response at 3, it does not explain its continued reliance on Rosario's faulty recollection of a fire occurring "years later"[8] in the face of a letter from F.O.C.U.S.' current director referring to a "big fire in 1982."

15. In any event, Las Americas has not explained why it did not discover the file's absence by April 1989 when it was required by section 73.3526 to update the file to include the amendment changing its community of license. Indeed, Bernard's October 1, 1990 declaration concedes that he last visited F.O.C.U.S. in 1983 or 1984, and that the April 1989 amendment was placed on file at F.O.C.U.S. "after some delay and confusion on [his] part." Thus, there are substantial and material questions of fact as to how long the file was maintained, how diligently the file was updated, and whether Las Americas has deliberately misrepresented the cause or the duration of the unavailability of its public file.

B. Financial Matters

16. In connection with the 1989 settlement, Las Americas represented that "it had a binding letter of commitment from Midlantic [Bank] in an amount sufficient . . . to make payments" due under the settlement.[9] However, Las Americas on April 26, 1990 acknowledged that "final arrangements" for the escrow account deposits have not been made, but it assured the Commission that "efforts to resolve these matters are continuing and Las Americas has every reason to believe that these matters will be resolved in a short period of time."[10] What Las Americas did not disclose on April 26, was the filing in the New York Supreme Court on April 10, 1990 of a lawsuit by a creditor seeking to enjoin Las Americas from paying off the dismissing applicants.[11] Nor did it reveal that the bank financing the settlement, having become aware of the lawsuit, was seeking indemnification, and that this was the primary obstacle in setting up the escrow accounts.

17. Directed by the May 29, 1990 Order to promptly advise the Commission of its "progress in establishing the escrow accounts," Las Americas submitted an additional pleading on June 21, 1990. Notwithstanding their clear relevance to Las Americas' progress in setting up the escrow accounts and to its financial qualifications (i.e., its ability to fund the settlement), neither the lawsuit nor the bank's related indemnification request were disclosed in that June 21 pleading. Instead, Las Americas stated:

> Las Americas has conducted lengthy negotiations with several lenders, including the bank it had previously relied on for reasonable assurance of its ability to make the escrow deposits; however, market conditions for obtaining such loans have changed markedly in recent months and Las Americas has not yet been able to obtain the financing it needs to complete the escrow deposits . . . . A meeting between Las Americas' principals, their local counsel and officials at the bank which had originally agreed to provide financing was held on [June 21, 1990]. All parties were favorably impressed with Las Americas' latest proposal for meeting the banks [sic] new security requirements for the loan needed to complete the escrow deposits. Las Americas anticipates that it can complete all necessary arrangements for the deposit within thirty days.

Las Americas' Response at 3-4 ¶ 4. Thus, by again attributing the escrow difficulties to "market conditions" and "new security requirements," Las Americas continued to conceal the real cause of the delay in making the escrow deposits -- the lawsuit and the bank's related indemnification request.

18. At issue in the lawsuit is a debt incurred by Las Americas in September 1986, for a loan entitling the lender to the higher of $360,000 or 12% of the station's assessed value, and providing that the lender may demand repayment at the end of two years (if Las Americas' application is still pending) and that such loan payments are to have priority over payments under any subsequent settlement.[12] Despite the express direction to report its "progress in establishing the escrow accounts" and its obligation under 47 C.F.R. § 1.65 to report changes in decisionally significant matters to the Commission, Las Americas reported the lawsuit and the loan only *after* learning that they had been discovered by Global.[13]

19. Even after reporting these matters in its July 5, 1990 Supplement, moreover, it appears that Las Americas continued to dissemble about the real cause of its escrow difficulties. In its October 1, 1990 Response, Las Americas attributed the escrow trouble to "a worsening borrowing climate," and to delays caused by "grasping" applicants who "simply wanted more money" or "balked at signing the Intercreditor Agreement required by the proposed lender." But the dispute involving the applicant who demanded a higher pay-off was resolved in November 1989, long before the Commission approved the settlement. As to the intercreditor agreement, Comserv disputes that any of the settling applicants "balked" at signing the agreement or otherwise delayed funding of the escrow accounts. Indeed, the settlement appears to cover this very situation by requiring that, if an intercreditor agreement is not reached by a certain date, additional funds must be put in escrow. In any event, it appears that the lawsuit was the primary obstacle delaying the establishment of the escrow accounts, a matter that Las Americas was obliged, pursuant to section 1.65 and the May 29, 1990 Order, to report promptly to the Commission.

20. There is also a substantial and material question as to whether Las Americas made misrepresentations or lacked candor in connection with Comserv's October 26, 1986 request for financial issues against Las Americas. Filed soon after the execution of the September 17, 1986 loan agreement (at issue in the April 1990 litigation), Comserv's motion to enlarge alleged that Las Americas' $750,000 bank loan exceeded the bank's lending limit. In response, Las Americas claimed to need only $500,000 and to have a "cushion" of $250,000 or $100,000 (depending on the bank's lending limit). It did not disclose the $360,000 debt incurred by the 1986 loan. Finding no *prima facie* basis for an issue, the Review Board denied Comserv's motion to enlarge (2 FCC Rcd at 1614 ¶ 3). Had it known of an additional $360,000 obligation which was sufficient to wipe out any "cushion" and which could have been due in September 1988 -- a matter not reported by Las Americas until July 5, 1990 -- the Board would have been faced with a substantially different question.[14]

21. Las Americas explains, however, that the bank providing its pre-settlement financing was fully aware of the $360,000 loan, and its attorney, Lawrence J. Bernard, had advised Las Americas that he had negotiated the loan in such a way that it did not need to be reported. But the bank's unconcern about the loan did not affect Las Americas' Section 1.65 obligation to report *to the Commission* any change in its financial proposal. As to the claimed reliance on counsel, Las Americas is correct that disqualification is not automatic where an applicant acquiesces in the misconduct of its counsel,[15] and that such reliance may mitigate against disqualification in some circumstances.[16] But such reliance does not excuse intentional concealment of information.[17] As the duty of candor is basic and well recognized,[18] good faith reliance on the advice of counsel does not alter that fundamental duty particularly if, as in this case, the counsel allegedly relied on is a principal of the applicant.[19]

22. Here, the pleadings reflect a disturbing pattern of apparent concealment and half-truths about matters of clear decisional significance. This pattern, which predates the 1989 settlement, raises substantial and material questions of fact as to whether Las Americas has breached its fundamental duty of candor and about its propensity to be truthful with the Commission in the future. And, despite repeated assurances from Las Americas that its financial problems are near an end, substantial and material questions of fact exist as to whether it is financially qualified to meet its pecuniary obligations under the settlement agreement.[20] This, together with its apparent lack of candor concerning the alleged disappearance of its public file, warrant the specification of financial and misrepresentation/lack of candor issues against Las Americas.[21] Thus, we vacate our approval of the settlement, reinstate the previously dismissed applications (and the attendant pleadings), and return this case to active hearing status. Based upon our review of the reinstated pleadings, we find, as set forth in paragraphs 27-37 below, that Las Americas prevails under the standard comparative issue. We must therefore remand this proceeding for evidentiary hearings on the specified issues as to its basic qualifications.

C. Unauthorized Construction

23. Las Americas' original application proposed to operate with the facilities of deleted station WHBI. When amending its application to specify Jersey City as the community of license, Las Americas proposed no change in its technical proposal. In its July 5, 1990 Supplement Las Americas disclosed for the first time that it had proceeded to construct and that it intended to begin operating in the immediate future. Not revealed until later was the loss of Las Americas' original site and the construction at a different site of facilities technically similar to those used by the interim operator, Global. Having constructed without benefit of an amendment to its application, or an application to modify the construction permit, Las Americas filed with the Mass Media Bureau a request for Special Temporary Authorization and an application to modify construction permit on July 24, and July 25, 1990, respectively.

24. Claiming premature construction of facilities that are substantially different from those proposed in Las Americas' application, Global urges us to assume jurisdiction over these matters and impose sanctions against Las Americas. We decline to do so. These matters are properly before the Bureau and there is no reason for handling them in a special manner. In any event, our action herein vacating the Order granting Las Americas' application and returning this case to active hearing status does not affect the Bureau's jurisdiction over these matters. It remains free to consider whether the alleged premature construction warrants the imposition of administrative sanctions against Las Americas or whether the ALJ should be asked to add an appropriate hearing issue against Las Americas to be explored in the context of this adjudicatory proceeding.

25. While we decline to address the propriety of the procedure followed by Las Americas in this case at this time, we emphasize that an applicant opting to construct before the grant of its application becomes final does so at its own risk. Thus, even if it were entirely proper, Las Americas' construction before final resolution of all outstanding issues in this proceeding would create no equities in its favor.

IV. APPLICATIONS FOR REVIEW

26. Having vacated our approval of the settlement, we turn to the reinstated applications for review of the Review Board's disqualification of Antonin & Garcia and selection of Las Americas as the comparatively superior applicant.[22] We substantially agree with the findings and conclusions of the Board, and we affirm them, except as modified below. We find that Antonin & Garcia is not basically qualified,[23] and that Las Americas prevails on the comparative issue, with Multicultural ranking second, Omnilingual third, Comserv fourth, and Caprice fifth.

27. *Diversification*: We vacate the Board's holding (paragraphs 26-27) that Subsidiary Communications Service and Instructional Television Fixed Service programming interests are cognizable for diversification purposes. We need not reach this novel issue because, whether Multicultural gets only a very slight demerit for its controlling interest in a Chinese daily newspaper with more than a minimal circulation in New York City (located within the service area)[24] or a slight demerit for the newspaper and various SCA-ITFS interests, it ranks behind Las Americas but far ahead of Omnilingual, Comserv, and Caprice under the standard comparative issue.[25]

28. *Integration*: We affirm the award of 100% full-time credit to Las Americas and Multicultural; 60% full-time credit to Omnilingual; and 40% full-time and 20% part-time credit to Comserv. We likewise affirm the Board's determination that Las Americas's integration proposal is qualitatively superior to that of Multicultural. 1 FCC Rcd at 795 ¶ 39. We conclude, however, that Caprice, awarded 6% full-time and 6% part-time integration credit by the Board, has not shown a reliable integration proposal meriting any comparative credit under *Royce International Broadcasting*, 90-390 (adopted November 13, 1990).

29. *Caprice*: In *Royce* the Commission held that "where the applicant has failed to demonstrate reliably that nominally controlling principals will in fact exercise control... [there is] no basis for awarding any integration credit at all." 5 FCC Rcd at ¶ 10. By way of example, it explained that "[t]he ownership and control of the applicant may be shown to be fatally uncertain because . . . (2) a person with no disclosed ownership interest (again, rather than the supposedly active owner) is in a position to exercise significant control over the applicant." *Id.*

30. Caprice has not demonstrated reliably that its 88% stockholder and proposed general manager, Arlen Kantarian, will in fact exercise *any* control over Caprice. As both the ALJ and the Board found, Kantarian had not been involved, and showed little interest in becoming involved, in the application, deferring instead to his stepfather and legal counsel, Jack Chadrjian. 1 FCC Rcd at 793 ¶ 31. While not an owner of Caprice, Chadrjian has had, and there is no evidence that he will cease to have, primary responsibility for the organization, corporate affairs, and prosecution of Caprice's application. 1 FCC Rcd at 793 ¶¶ 31-32. Under these circumstances, we have no basis for ascertaining who will actually exercise control, and thus, even partial credit is not warranted for Caprice's integration proposal.

31. *Comserv*: In contrast, the award of 40% full-time and 20% part-time credit for the proposed integration of Comserv owners Sonya Suarez, Cecil R. Forster, and Charles Hamilton is consistent with *Royce*, which contemplates partial integration credit when nominally active owners share control over the applicant with nominally passive owners.[26] Originally comprised of five *voting* 20% stockholders, all of whom contributed an equal amount of money to the applicant (Tr. at 1020, 1032), Comserv intended from the outset that Suarez and Forster would manage the station full-time, that Hamilton would be involved part-time, and that Stuart J. Beck and W. Don Cornwell, although exercising their rights to influence the applicant's affairs through their voting interests, would not be actively involved in the day-to-day management of the proposed station (Tr. at 977-83, 1018).

32. Amending its application on the B cut-off date to specify two classes of stock (voting and non-voting), Comserv seeks 99.5% full-time and .5% part-time integration credit. Under the B cut-off date reorganization, each owner retained 20% equity, but Beck and Cornwell gave up their voting stock, Hamilton retained only .5% voting stock, and Suarez and Forster increased their share of the voting stock to 49.75% each. All five owners, including the three relinquishing all or most of their voting stock on the B cut-off date, will continue to share profits and expenses equally (Tr. at 1037-38), and future contributions to capital will be divided equally (Tr. at 1054-55, 1057).

33. The Board properly disregarded the B cut-off date amendment, and attributed the equity interests of the allegedly passive owners.[27] Partial credit is warranted because there is no indication that the three active owners will unduly defer to the wishes of the allegedly passive owners or otherwise cede complete managerial control to them. Instead, the record reflects that allegedly active principals Suarez, Forster, and Hamilton have been, and will continue to be, involved in the management of Comserv, but it affords no assurance that they will have exclusive control over Comserv such that the nominally passive owners, Beck and Cornwell, will not exercise any control over the applicant.

34. In this regard, Beck and Cornwell, active since before Comserv's formation,[28] continued to have an active role in Comserv's corporate affairs even after the B cut-off date amendment designating them as non-voting stockholders.[29] This activity is inconsistent with their purported role as "passive" stockholders, and we have no assurance that Comserv will observe the passive-active distinction in the future.

35. Indeed, while there was no formal mechanism after the B cut-off date whereby the non-voting stockholders could make their views known to the voting stockholders (Tr. 1017), Forster testified that as proposed general manager he would certainly listen to their recommendations on financial and legal matters inasmuch as Cornwell is an investment banker and Beck is an attorney (Tr. 1018, 1079-80). Hamilton confirmed that Cornwell's involvement would continue because "[h]e's a very important part of our basic resources and advice on financial matters" (Tr. 1128). Thus, it is clear that voting stockholders Suarez, Forster, and Hamilton will not exercise *exclusive* control over the applicant, but will share that control with purportedly passive stockholders Beck and Cornwell. The equity interests of Beck and Cornwell are therefore fully attributable for integration purposes. *See Royce International Broadcasting*, 5 FCC Rcd at _____ ¶ 9, citing *Coast TV, Inc.*, 5 FCC Rcd 2752-53 ¶¶ 8-10, 16 (1990).

V. ORDERS

36. ACCORDINGLY, IT IS ORDERED, That the petitions for reconsideration, filed April 13, 1990, by Comserv and Multicultural ARE DENIED; that the petitions for reconsideration filed April 13, 1990, by Coalition and Global ARE DISMISSED in part and DENIED in part; that the petition for reconsideration, filed April 13, 1990, and the Motion for Stay, filed July 13, 1990, by Committee to Preserve Multi-Ethnic and Multi-Lingual Programming ARE DISMISSED; and that the Petition for Extraordinary Relief, filed August 1, 1990, by Global IS DENIED.

37. IT IS FURTHER ORDERED, That *Las Americas Communications, Inc.*, 5 FCC Rcd 1634 (1990), IS SET ASIDE; that the applications filed by Antonin & Garcia (File No. BPH-821108AQ), Caprice Broadcasting Group, Inc. (File No. BPH-821108AS), Comserv Broadcasting Group, Inc. (File No. BPH-821108AV), Multicultural Broadcasting, Inc. (File No. BPH-821108BE), Omnilingual Broadcasting, Inc. (File No. BPH-821108BK) ARE REINSTATED; and that the pleadings dismissed as moot in paragraph 35 of that Memorandum Opinion and Order ARE REINSTATED.

38. IT IS FURTHER ORDERED, That the Petition for Leave to File Information Statement, filed May 21, 1987 by Multicultural Broadcasting, Inc., IS GRANTED, and that the attached Information Statement IS ACCEPTED.

39. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. § 155(c)(5) and 47 C.F.R. § 1.115(g), the applications for review, filed April 15, 1987 by Antonin & Garcia, Multicultural Broadcasting, Inc., Caprice Broadcasting Group, Inc., and Comserv Broadcasting Group, Inc., ARE GRANTED in part and DENIED in part; that the Application for Review, filed April 16, 1987 by Omnilingual Broadcasting, Inc., IS DENIED; that the application for review, filed December 29, 1986 by Jersey City Broadcasting Company IS DISMISSED in part and DENIED in part; that paragraphs 5, 14-16, 26-27, and 36 of the Review Board's Decision, 1 FCC Rcd 786 (1986) ARE DELETED; that the Review Board's Decision IS AFFIRMED, as modified herein; and that the application of Antonin & Garcia (File No. BPH-821108AQ) IS DENIED.

40. IT IS FURTHER ORDERED, That the application for review, filed April 15, 1987, by Metrolina Media, Inc., the Petition to Accept Brief of *Amicus Curiae* and the

Brief of *Amicus Curiae*, filed November 25, 1987 by Memphis Telecasters, Ltd., and the Contingent Application for Review, filed on January 16, 1987, by The Committee to Preserve Multi-Ethnic and Multi-Lingual Programming ARE DISMISSED as moot.

41. IT IS FURTHER ORDERED, That the record in the above captioned proceeding IS REOPENED AND REMANDED to the presiding Administrative Law Judge for further hearings in accordance with this Memorandum Opinion and Order, and for the preparation of a Second Supplemental Initial Decision on the following issues:

(a) To determine whether Las Americas is financially qualified;

(b) To determine whether Las Americas made material misrepresentations or lacked candor with respect to its financial qualifications (1) in response to Comserv's October 1986 motion to enlarge issues; (2) in connection with the 1989 settlement; or (3) in pleadings filed after the March 1990 Memorandum Opinion and Order approving the settlement agreement;

(c) To determine whether Las Americas made material misrepresentations or lacked candor concerning both its compliance with section 73.3526 of the Rules and the cause and the duration of the disappearance of its public file; and

(d) To determine the effect of the findings made under Issues (a) through (c) on Las Americas' basic qualifications to be a Commission licensee.

42. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of the evidence under Issues (a) through (c) SHALL BE on Comserv and Multicultural, and that the burden of proof under issue (d) SHALL BE on Las Americas.

43. IT IS FURTHER ORDERED, That the ALJ IS DIRECTED to expedite the further hearings ordered herein and that exceptions to the Second Supplemental Initial Decision SHALL BE FILED with the Commission.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Las Americas Communications, Inc.*, 1 FCC Rcd 786 (Rev. Bd. 1986), motion to enlarge issues denied, 2 FCC Rcd 1614 (Rev. Bd. 1987). The Board disqualified on character grounds the only Jersey City applicant (Antonin & Garcia), and selected Las Americas as the comparatively superior applicant for Newark.

[2] *Las Americas Communications, Inc.*, 5 FCC Rcd 1634 (1990).

[3] Now before the Commission are: (*a*) Petitions for Reconsideration, filed April 13, by Coalition of Concerned Newark Citizens, Global Broadcasting Group, and Committee to Preserve Multi-Ethnic and Multi-Lingual Programming, and April 16, 1990 by Multicultural Broadcasting, and Comserv Broadcast Group; (*b*) Supplement, filed August 3, 1990 by Comserv; (*c*) Oppositions, filed April 26, and May 1, 1990 by Las Americas Communications, and April 26, 1990 by the Mass Media Bureau; (*d*) Replies, filed May 8, by Global, and May 11, 1990 by Comserv and Multicultural; (*e*) Response To Bureau Opposition and Motion for Leave to File Response, filed May 22, 1990 by Comserv; and (*f*) Motion for Stay, filed July 13, 1990 by Committee, and Oppositions, filed July 20, by the Bureau, and July 26, 1990 by Las Americas. Letter pleadings are inappropriate under our rules, and we have not considered Joinder Associates' April 23, 1990 letter stating that it expects Las Americas to meet its obligations under that agreement. (The agreement requires Las Americas to assume Antonin & Garcia's settlement obligations to Joinder, a former applicant voluntarily dismissing under a 1984 settlement.) Also before the Commission are the following pleadings filed in response to an order issued under delegated authority (FCC 90I-54, released May 29, 1990) inviting Las Americas to clarify certain matters raised in the Petitions for Reconsideration: (*a*) Responses, filed June 21, and July 5, 1990 by Las Americas; (*b*) Replies, filed July 10, and August 3, 1990 by Global, and July 17, 1990 by Multicultural and Comserv; (*c*) Responses, filed on October 1, and October 26, 1990 by Las Americas, and October 11, 1990 by Multicultural, Comserv, and Global; (*d*) Reply, filed October 11, and November 2, 1990 by Global; and (*e*) Comments, filed November 7, 1990 by Las Americas.

[4] Committee is not entitled to intervene in this proceeding on the ground that other parties raised similar claims as to the program format of the interim operator. Compare *Office of Communication of the United Church Of Christ v. FCC*, 911 F.2d 803, 808-09 (D.C. Cir. 1990) (late entry into Commission proceedings is justified, for purposes of seeking judicial review, if the issues pursued on appeal are substantially the same as those raised by other parties). To the extent that Global and Committee raise similar arguments, Global also lacks standing to intervene.

[5] *Community Broadcasting Co. v. FCC*, 274 F.2d 753 (D.C. Cir. 1960).

[6] *See McAlister Television Enterprises, Inc.*, 60 RR 2d 1379, 1383-84 ¶ 8 (1986); *Ninety Two Point Seven Broadcasting*, 55 RR 2d 607 (1984).

[7] *Las Americas Communications, Inc.*, FCC 90I-54, ¶ 5 (released May 29, 1990).

[8] Attached to the October 1, 1990 Response is an undated certification from Rosario that reaffirms his earlier statements but acknowledges that he is "82 years old and cannot remember the specific years all that well."

[9] Las Americas-Comserv Settlement Agreement ¶ 10.

[10] Las Americas' April 26, 1990 Opposition to Petitions For Reconsideration Filed By Comserv and Multicultural at 2, 3.

[11] The state court granted plaintiff's motion to compel arbitration but denied its motion for injunction because the plaintiff sought only monetary damages, which is not the type of injury necessary to support an injunction.

[12] Las Americas explains that it never promised the settling applicants that the payments under the 1989 settlement would take priority over previous obligations. But whether such a promise was made to the other applicants is immaterial. The loan agreement provided that, if Las Americas has not dismissed its application pursuant to a settlement agreement and if its application is not granted within two years of the execution of the agreement, the lender may demand repayment. *See* Attachment to Las Americas' October 1, 1990 Supplement. Thus, the $360,000 obligation should have been reported *to the Commis-*

sion both at the time it was incurred and at the time of the April 1989 settlement because it potentially affected Las Americas' financial ability to construct and operate the proposed station, and to pay off the other applicants under the 1989 settlement agreement.

[13] Global alluded to the lawsuit in its June 29, 1990 letter to Las Americas. It also referred to this matter in a Motion for Extension of Time filed on July 3, 1990.

[14] In a statement under penalty of perjury, dated October 31, 1986 and tendered with Las Americas' November 7, 1986 Opposition, Raul Bernard stated that "[a]ll of the obligations incurred in the prosecution of the application have been paid as of this date and thus all of the money available from the bank can be used for construction." It appears, however, that Las Americas used the proceeds of the undisclosed loan to cover expenses incurred in prosecuting its application, and thus that Las Americas' total obligations were greater than represented.

[15] *Cumberland Broadcasting Corp. v. FCC*, 647 F.2d 1341 (D.C. Cir. 1980).

[16] *RKO General, Inc. v. FCC*, 670 F.2d 215, 231 (D.C. Cir. 1980), citing *Asheboro Broadcasting Co.*, 20 FCC 2d 1, 3 (1969). *See* also *WEBR v. FCC*, 420 F.2d 158 (D.C. Cir. 1969).

[17] *WADECO, Inc. v. FCC*, 628 F.2d 122, 127-29 (D.C. Cir. 1980); *Mid-Ohio Communications, Inc.*, 5 FCC Rcd 4596, 4597 n.2 (1990).

[18] *RKO General*, 670 F.2d at 232, citing *Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240, 243 (D.C. Cir.). *See Mid - Ohio Communications*, 5 FCC Rcd 940 ¶ 5, recon. denied, 5 FCC Rcd 4596 (1990); *Character Qualifications*, 102 FCC 2d at 1211 ¶ 61, describing "misrepresentation and lack of candor in an applicant's dealing with the Commission as serious breaches of trust [affecting] [t]he integrity of the commission's processes."

[19] *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1142 (D.C. Cir. 1985), citing *RKO General, Inc. v. FCC*, 670 F.2d 215, 231 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982), upholding a licensee's disqualification for lack of candor despite its reliance on counsel ("The client becomes fully responsible at some point . . . particularly when [there are a great] number of pleadings and other opportunities for dissembling"). *See* also *WEBR v. FCC*, 420 F.2d 158 (D.C. Cir. 1969).

[20] Las Americas claims, without corroboration, that it now "has every expectation that the loan will be approved [by a new lender]," but it has not filed a section 1.65 amendment reporting actual approval of a new loan. *See* October 1, 1990 Response at 6.

[21] *Merrimack Valley Broadcasting*, 57 RR 2d 713, 716 n.9 (1984).

[22] We deny that portion of the application for review filed by non-party Jersey City Broadcasters Company (JCBC) objecting to the Board's refusal to reinstate its application for Jersey City. Having voluntarily dismissed that application under a 1984 settlement, it is not entitled to be reinstated following the disqualification of Antonin & Garcia, as the Board properly held. 1 FCC Rcd at 795 ¶ 40. To the extent that JCBC addresses other issues, that portion of its application for review is dismissed because JCBC is no longer a party to this proceeding. The Committee also lacks standing to appeal anything other than the Board's refusal (1 FCC Rcd at 795 ¶ 40) to permit it to file an *amicus* brief in support of Omnilingual's request for a foreign language programming issue. As we agree with the Board that Omnilingual does not prevail on the comparative issue, Committee's Contingent Application for Review is moot.

[23] We affirm Antonin & Garcia's disqualification on the candor issue (1 FCC Rcd at 791 ¶ 22), and therefore we need not consider whether it should also have been disqualified under the financial issues or whether Mary Garcia's unadjudicated tax problems are cognizable under the *Character Policy Statement*, 102 FCC 2d 1179, 1205 & n.60 (1986) (subsequent history omitted) (nonbroadcast misconduct may be relevant if it is so egregious as to shock the conscience). We therefore vacate paragraphs 5, 14-16 of the Board's decision addressing these issues and dismiss as moot Metrolina's application for review and Memphis Telecasters' petition to accept *amicus brief* relating to the financial issues.

[24] Multicultural's sole owner, Arthur Liu, and his wife jointly own 80% of the newspaper. *Supplemental Initial Decision*, FCC 86D-11 Findings ¶ 73 (Feb. 20, 1986). By its May 21, 1987 Petition For Leave to File Informational Statement, Multicultural reports that the Chinese paper is now published on a weekly basis. While we accept the Informational Statement, this post B cut-off change does not affect our comparative analysis.

[25] Even if the SCA and ITFS interests were considered under diversification, no more than a slight demerit would be warranted. (The ALJ improperly gave a substantial demerit.) In view of our conclusions in paragraphs 28-35 below, that the proposals of Omnilingual, Comserv, and Caprice merit far less than the 100% integration credit awarded to Multicultural (and Las Americas), Multicultural would outrank the other three applicants even with the slight diversification demerit assessed by the Board. *See Gilbert Broadcasting Corp.*, 91 FCC 2d 450, 469-70 ¶ 59 (1982), recon. denied, FCC 83-30 (Jan. 25, 1983).

[26] The award of only 60% integration credit to Omnilingual, the only other applicant receiving less credit than claimed for its integration proposal, which we affirm, was not based on the active-passive issues addressed in *Royce*.

[27] We vacate paragraph 36 of the Board's Decision holding Hamilton's status as both a voting and a non-voting stockholder to be an independent basis for disregarding the amended integration proposal. *See Cotton Broadcasting Co.*, 4 FCC Rcd 1781, 1782 ¶¶ 9-11 (1989), decided after the Board's decision.

[28] While not necessarily dispositive, the pre-formation activities of allegedly passive owners Beck and Cornwell confirm their involvement in Comserv. *See Metroplex Communications, Inc.*, 5 FCC Rcd 5610, 5612 ¶ 14 & n.8 (1990) (totality of facts relevant in determining the *bona fides* of an applicant's proposal). Prior to the formation of Comserv, Hamilton, Cornwell, and Forster had an ongoing interest in acquiring broadcast properties (Tr. 1075-76, 1139). Hamilton introduced Beck to this "built-in group," but they previously discussed their mutual interest in acquiring broadcast properties (Tr. 1138-39). Moreover, Hamilton, Cornwell, and Beck played an active role in the formation of the application (Tr. 1054, 1074-75, 1138-39), serving as officers and directors from the outset (Tr. 1108, 1076). Hamilton, now owning 33.2% non-voting stock and only .5% voting stock, handled Comserv's incorporation, designed the revised corporate structure on the B cutoff date, prepared the original draft of the articles of incorporation, keeps the corporate minutes, and has been the main contact with counsel (Tr. 1029, 1046, 1102, 1108, 1013-14).

[29] While no longer officers or directors of Comserv (Tr. 1008-09), both continued to attend Comserv Board meetings, and remained involved in the consideration of financial and legal matters (Tr. 1009-10, 1012, 1014). After the B cut-off date, 33.4 percent non-voting stockholder Beck selected the applicant's current counsel, attended meetings where litigation strategy was discussed, made suggestions concerning the prosecution of Comserv's application, and dealt with counsel (Tr. 1012, 1014). Cornwell likewise continued to play a central role in financial matters after the B cut-off date. This involvement

included meeting with financial institutions and participating in planning sessions concerning the financing and operation of the proposed station (Tr. at 1079-80).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATION
SERVICES, INC.
Complainant,

v.

CENTRAL TELEPHONE COMPANY OF FLORIDA and CENTRAL TELEPHONE COMPANY-NEVADA
Defendants.

File No. E-89-210
File No. E-89-211

ORDER

Adopted: March 4, 1991; Released: March 12, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On May 30, 1989, Allnet Communication Services, Inc., filed the above-captioned complaints, seeking recovery of damages for the alleged overstatement of defendants' interstate revenue requirements. On February 21, 1991, the parties filed a joint motion to dismiss the complaints with prejudice. The parties state that all claims in the action have been settled between the parties, with defendants admitting no liability.

2. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the request for dismissal of the above-captioned complaints IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v. File No. E-90-09

NATIONAL EXCHANGE CARRIER ASSOCIATION, INC., AND THE MAJOR PARTICIPANTS IN ITS 1988 CARRIER COMMON LINE POOL
Defendants.

ORDER

Adopted: March 5, 1991; Released: March 12, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 3, 1989, AT&T Communications (AT&T) filed the above-captioned complaint against the National Exchange Carrier Association, Inc. ("NECA"), alleging that the NECA carrier common line rate for 1988 was unjust and unreasonable in violation of 47 U.S.C. § 201(b). This action was filed by AT&T as a companion proceeding to a complaint against Southwestern Bell Telephone Company, a local exchange carrier ("LEC") that participated in NECA's Carrier Common Line pool.

2. On February 13, 1991, AT&T filed a motion to dismiss this complaint with prejudice. AT&T states that as a result of discussions between the parties, the companion complaint was dismissed by the Commission.[1] Therefore, AT&T concludes that no purpose would be served by the continued pendency of this proceeding against NECA.

3. We are satisfied that dismissal of this complaint will serve the public interest by eliminating the expenditure of further time and resources of the parties and of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R.§ 0.291, that the request for dismissal of the above-captioned complaint IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] AT&T Communications v. Southwestern Bell Tel. Co., 6 FCC Rcd 444 (Enf. Div. Com. Car. Bur. 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,
Complainant,
v. File Nos. E-90-15
E-90-17

NATIONAL
EXCHANGE CARRIER
ASSOCIATION,
INC., AND THE
MAJOR PARTICIPANTS
IN ITS 1988
CARRIER COMMON
LINE POOL
Defendants.

ORDER

Adopted: March 5, 1991; Released: March 12, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 3, 1989, AT&T Communications (AT&T) filed the above-captioned complaints against the National Exchange Carrier Association, Inc. ("NECA"), alleging that the NECA carrier common line rate for 1988 was unjust and unreasonable in violation of 47 U.S.C. § 201(b). These actions were filed by AT&T as companion proceedings to complaints against certain local exchange carriers ("LECs") that participated in NECA's Carrier Common Line pool.

2. On February 14, 1991, AT&T filed a motion to dismiss these complaints with prejudice. AT&T states that as a result of discussions between the parties, the companion complaints have been dismissed by the Commission.[1] Therefore, AT&T concludes that no purpose would be served by the continued pendency of the proceedings against NECA.

3. We are satisfied that dismissal of these complaints will serve the public interest by eliminating the expenditure of further time and resources of the parties and of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R.§ 0.291, that the request for dismissal of the above-captioned complaints IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] AT&T Communications v. New England Tel. & Tel. Co., 6 FCC Rcd 905 (Enf. Div. Com. Car. Bur. 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-581

In re Applications of

COMPASS ROSE COMMUNICATIONS CORP.	File No. BPCT-880610KG
MARCICOPA COMMUNITY TELEVISION PROJECT	File No. BPCT-880802KF
Gregory R. Brooks d/b/a BROOKS BROADCASTING	File No. BPCT-880802KI

For Construction Permit for
New TV Station, Channel 61,
Phoenix, Arizona

Appearances

David M. Silverman and *Yvonne R. Bennett* on behalf of Compass Rose Communications Corp.[1]; *William P. Quigley* on behalf of Maricopa Community Television Project; *Barry D. Wood* and *Ronald D. Maines* on behalf of Brooks Broadcasting.

DECISION

Adopted: February 25, 1991; Released: March 12, 1991

By the Review Board: MARINO (Chairman), ESBENSEN. Board Member BLUMENTHAL not participating.

Board Member ESBENSEN:

1. Before the Review Board is the *Initial Decision*, 5 FCC Rcd 5432 (1990) (I.D.), of Administrative Law Judge Edward J. Kuhlmann (ALJ) in the captioned proceeding. Brooks Broadcasting (Brooks) and Maricopa Community Television Project (Maricopa) filed exceptions and replies thereto; Compass Rose Communications Corp. (Compass) filed exceptions only.[2] Pursuant to the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) ("*Policy Statement* "), this proceeding was heard on the "standard comparative" issue with respect to all parties. In addition, a financial qualifications issue was specified against Maricopa, and was adversely resolved against that applicant.

MARICOPA COMMUNITY TELEVISION PROJECT

2. The following financial qualifications issue was specified against Maricopa:

> To determine whether Maricopa Community Television Project has reasonable assurance of funds to construct and operate Channel 61 and, in light of that finding, whether it is financially qualified.

In adversely resolving this financial issue, the ALJ concluded that Maricopa was unqualified to be a licensee. In its Exceptions, Maricopa essentially admits that it is not financially qualified under current Commission standards, and unequivocally states that it "does not dispute the findings of fact" of the ALJ. Exceptions at p. 6. Instead, Maricopa contends that (*id.*, at pps. 6-7):

> The financing proposal package which [Maricopa] relied upon and continues to rely upon is not the standard, for-profit, upper-income financing proposal relied upon by other applicants in this and other proceedings. But just because it is not the usual does not mean [Maricopa] is financially unqualified.
>
> * * *
>
> [Maricopa] as a non-profit, non-stock corporation organized by and for low- and moderate-income people could not rely on its own financial resources or the resources of its directors. Resources to own media are beyond the reach of low- and moderate-income persons by definition. If they had the substantial personal assets like other applicants they would not be low- and moderate-income individuals.
>
> * * *
>
> Non-profit, non-stock applicants organized by and for low- and moderate-income people like [Maricopa] must have their financial qualifications evaluated differently than the other for-profit, high-income applicants. Otherwise, the high-income, for-profit applicants will always prevail because, by definition, they have greater access to traditional funding sources than low- and moderate-income individuals.
>
> Failure by the Review Board to adapt financial qualification requirements for the real, *practical* circumstances of low- and moderate-income persons and organization will effectively exclude this majority of the United States population from the media business.

3. Even if the Board were disposed to grant the relief requested by Maricopa, it is without authority to do so. *Horne Industries, Inc.*, 91 FCC 2d 1193, 1194 (Rev. Bd. 1982) ("the Board has never been authorized to make 'new policy or change old policy.'") It is a bedrock requirement that applicants for broadcast facilities must be financially qualified, *see* 47 U.S.C. § 308(b), and that they have, at a minimum, "reasonable assurance" of funds available to construct and operate as proposed. Indeed, the cases are legion in which applicants not possessing

such "reasonable assurance" are disqualified. *See, e.g., Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 (Rev Bd. 1990); *Rebecca L. Boedker*, 5 FCC Rcd 2855 (Rev. Bd. 1990); *Aspen FM, Inc.*, 5 FCC Rcd 3196 (Rev. Bd. 1990); *Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945, 7946 (Rev. Bd. 1989), *recon. denied*, 5 FCC Rcd 322 (1990), *review denied*, 5 FCC Rcd 5751 (1990) (subsequent history omitted); *JAM Communications, Inc.*, 4 FCC Rcd 3754, 3757 (Rev. Bd. 1989). Here, Maricopa concedes it cannot meet this most rudimentary requirement. In light of its concession that it is not financially qualified (and that it has never possessed "reasonable assurance" of such financing), we are compelled to affirm the ALJ's conclusions with respect to Maricopa. *Tri-State Communications*, 4 FCC Rcd 8258 (Rev. Bd. 1989), *recon. denied*, 5 FCC Rcd 534 (1990), *review denied*, 5 FCC Rcd 6232 (1990).[3]

COMPASS ROSE COMMUNICATIONS

4. Compass Rose has conceded that it does not now have "reasonable assurance" of its proposed transmitter site (and has not since September 1990). The revelation that Compass Rose suffers from this infirmity arose in the wake of Brooks' September 21, 1990 disclosure which advised that Brooks' original site (the same site specified by Compass Rose) was no longer available. While Brooks has timely amended to specify a new site, Compass Rose has merely filed a "Petition for Leave to Amend" (on October 23, 1990), admitting the loss of its site (based upon Brooks' disclosure); however, Compass Rose, to this date, has not attempted to amend to a new site. In the absence of a viable transmitter site, its application cannot be granted. *See 62 Broadcasting, Inc.*, 4 FCC Rcd 1768, 1771-1773 (Rev. Bd. 1989), *review denied*, 5 FCC Rcd 830 (1990); *Goodlettsville Broadcasting Co., Inc.*, 4 FCC Rcd 8627 (Rev. Bd. 1989), *review denied*, 5 FCC Rcd 4593 (1990). Additionally, Brooks has filed a Motion to Dismiss Compass Rose's application (on January 15, 1991; *see* n. 3, *supra)*, based upon Compass Rose's conceded loss of its transmitter site, and this motion remains unopposed to date. Accordingly, we will grant Brooks' Motion as to Compass Rose and dismiss the application of that applicant. We further note that even if Compass Rose were not dismissed, it could not otherwise prevail over Brooks on a comparative basis in light of the conceded attributable multiple broadcast/media interests of Compass Rose's principals.[4]

BROOKS BROADCASTING

5. Brooks is a sole proprietorship owned by Gregory Brooks, who proposes to work full-time as the General Manager of the station. He will supervise all aspects of construction, operation, administration, programming, business, and technical areas. He has been a resident of the service area since 1946 (except for a five month hiatus between September 1965 and January 1966). Brooks Exh. 1 at 1-2. Brooks will retain his residence within the proposed city grade signal coverage area in Maricopa County, *id.*, at 2-3, and he has been active in local community activities. Brooks has no attributable media interests. I.D., para. 23.

6. Compass Rose attempts to raise issues against Brooks based upon Brooks' alleged timely failure to disclose information concerning the loss of its transmitter site.[5] Our review of the various pleadings and declarations fails to reveal any substantial and material questions of fact concerning Brooks' disclosure. More specifically, on September 21, 1990, Brooks filed a document entitled "Statement Pursuant to Section 1.65" in which it disclosed to the Board that, "within the last thirty days," it learned it no longer had "reasonable assurance" of its proposed transmitter/tower site. Thereafter, on October 3, 1990, Brooks filed a Petition for Leave to Amend, specifying a new site. On October 15, 1990, the Commission's Mass Media Bureau filed comments supporting Brooks' amendment. We agree with the Bureau that good cause exists for accepting Brooks' amendment, pursuant to 47 CFR § 73.3522(b), and the "tests" for demonstrating good cause enunciated in *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970) have been met by Brooks. Further, the Bureau has determined that Brooks' new site fully conforms to the Commission's technical requirements (set forth in 47 CFR § 73.601 *et. seq.*). Thus, no further questions concerning Brook's site remain.

CONCLUSIONS

7. Maricopa is not qualified to be a Commission licensee. Compass Rose, admitting that it does not now possess "reasonable assurance" of a transmitter site, and has not attempted to amend its application to specify a new site, will be dismissed. On the other hand, Brooks has established that he is fully qualified to construct and operate as proposed; would otherwise be the comparatively superior applicant; has timely amended his application to report the unexpected loss of his original transmitter site; and has obtained a new site. Thus Brooks, as the only remaining fully qualified applicant, will be awarded the construction permit for this new UHF television facility at Phoenix, Arizona.

8. ACCORDINGLY, IT IS ORDERED, That the Motion to Enlarge Issues filed October 18, 1990 by Compass Rose Communications Corp., IS DENIED; and,

9. IT IS FURTHER ORDERED, That the Petitions for Leave to Amend filed by Brooks Broadcasting on October 3, 1990, and November 1, 1990 (as supplemented November 8, 1990) ARE GRANTED, and the attached amendments ARE ACCEPTED; and,

10. IT IS FURTHER ORDERED, That the Petition for Leave to Amend, filed October 23, 1990, by Compass Rose Communications Corp. IS GRANTED, and the amended information contained therein IS ACCEPTED for reporting purposes only; and,

11. IT IS FURTHER ORDERED, That the unopposed Motion to Dismiss filed by Brooks Broadcasting on January 15, 1991, IS GRANTED with respect to the application of Compass Rose, and the application of Compass Rose Communications Corp. (File No. BPCT-880610KG) IS DISMISSED; and,

12. IT IS FURTHER ORDERED, That the application of Maricopa Community Television Project (File No. BPCT-880802KF) IS DENIED, and the application of Brooks Broadcasting (File No. BPCT-880802KI) for a new UHF television facility at Phoenix, Arizona, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] On November 15, 1990, counsel filed a Notice of Withdrawal of Counsel, advising the Board to forward all communications directly to Compass Rose. No subsequent notice of appearance has been filed by, or on behalf of, that applicant.

[2] On the request of at least one of the applicants (Maricopa), the Board scheduled oral argument for January 16, 1991 (later rescheduled for February 15, 1991). However, none of the parties subsequently filed the required notice of appearance (*see* 47 CFR § 1.277(c)) indicating their desire to participate. Because one of the applicants was apparently proceeding *pro se* (Compass Rose; *see* n. 1, *supra)*, the Board telephonically contacted the parties (on February 13, 1991) to ascertain whether they intended to appear. Counsel for Maricopa (although he had requested oral argument) indicated that he would not, in fact, attend. The principal of Compass Rose (David Drucker) indicated that no one would appear on behalf of that applicant, and represented that he had previously filed with the Board a motion to dismiss the application of Compass Rose. In view of these circumstances, oral argument was cancelled. However, to date, the Board has not received the Compass Rose Motion to Dismiss.

[3] In a Motion to Dismiss filed on January 15, 1991, Brooks (seeking dismissal of the applications of both Compass Rose and Maricopa) claims that Maricopa also specified the identical original transmitter site; that Brooks disclosed, on September 21, 1990, that this site was no longer available to it (or any other applicant in this proceeding); that Maricopa has never notified the Board of its apparent loss of site; and that neither Maricopa (nor Compass Rose) has attempted to amend to specify a new site.

[4] Compass Rose principal David M. Drucker owns 80% of the common stock of High Seas Communications Corp. High Seas is the general partner and 25% equity owner of The Denver Channel 59 Partnership, Ltd., licensee of UHF station KUBD-TV, Denver, Colorado. Compass Rose Exh. 4A. Drucker is also Vice-President and owns 20% of the common stock of Echonet Corporation, which owns 50% of Longmont Channel 25, Inc., which, in turn, holds a construction permit for Channel 25, Longmont, Colorado. *Id.* Echonet Corporation is also the licensee of KDMD(TV), UHF Channel 33, Anchorage, Alaska, and is the permittee of UHF Channel 20 in Billings, Montana. *Id.* Echonet also holds licenses for low power television stations in Fort Collins, Colorado; Austin, Texas; Cheyenne, Wyoming; and Anchorage, Alaska. Compass Rose Exh. 4A at 3. It also holds permits for low power television stations in Albuquerque, New Mexico, and Colorado Springs, Colorado. *Id.* Mr. Drucker also owns 30% of Sandfiddler Spectrum Corporation, which acquired a construction permit for a low power television station in Newport News, Virginia. *Id.*, at 4. He owns 5% of Echostar Satellite Corporation (where he is Vice-President and a director). Echostar holds a conditional construction permit for a direct broadcast satellite system. *Id.* Echostar proposes to provide eleven channels of television service to the entire country, including Arizona. *Id.*; Tr. 248-49, 252. Drucker's spouse, Penny, holds a construction permit for UHF Channel 22, Key West, Florida; a license for a low power television station in Santa Fe, New Mexico; and a construction permit for a low power television station in Aspen, Colorado. She also owns a 10% interest in Sandfiddler. Compass Rose Exh. 4A at 3-4.

[5] In its Exceptions, Compass Rose again attempts to raise questions concerning Brooks' wife as a real-party-in-interest and Brooks' financial qualifications (because funds for construction and operation will come from the Brooks' joint accounts). The ALJ properly rejected these arguments by *Memorandum Opinion and Order*, FCC 90M-83, released January 12, 1990, and we find that these allegations are no more than speculation and surmise, and do not raise substantial and material questions of fact sufficient to add issues and remand this proceeding. *See A.P. Walter, Jr.*, FCC 91R-13, released February 14, 1991, at para. 20.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

GTE MOBILNET OF INDIANA LIMITED PARTNERSHIP — File No. 04902-CL-MP-90

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block B, in Market No. 247, Lafayette, Indiana, for station KNKA593

MEMORANDUM OPINION AND ORDER

Adopted: March 6, 1991; Released: March 13, 1991

By the Chief, Mobile Services Division:

1. GTE Mobilnet of Indiana Limited Partnership (GTE) filed the captioned application to modify cell sites 1 and 2 of its existing cellular system in the Lafayette, Indiana Metropolitan Statistical Area (MSA). A petition to deny was filed by Indiana RSA 4 Limited Partnership (ILP), wireline permittee in the adjacent Indiana 4 - Miami Rural Service Area (RSA). GTE filed a response. For the reasons set forth below, we deny the petition and grant GTE's application.

I. CONTENTIONS OF THE PARTIES

2. ILP objects to the proposed modification of cell 1 because the 39 dBu contour will extend beyond the MSA boundary and into the Indiana 4 RSA.[1] ILP admits that the extension area is small, but argues that the MSA boundary is straight rather than irregular, and that the extension could be be eliminated by reducing power in the direction of the RSA. ILP argues that the extension will allow GTE to secure potential RSA customers. ILP also states that the extension will cover three of the eight miles of Interstate highway 65 (I-65) within the RSA,[2] thus depriving ILP of "roamer" traffic. Finally, ILP argues that GTE's explanation for the extension is generic in nature, and lacks the specificity required by *Procedures Update*, 52 Rad. Reg. 2d (P&F) 725, 726 (1982). ILP contends that given the above factors, the proposed extension is not *de minimis*.

3. GTE responds that the extension is *de minimis* and adequately justified. GTE states that the extension is small in size, covering only 19.9 square miles and amounting to only 5.06 percent of the total cell area and 3.9 percent of the MSA. GTE states that, although the MSA boundaries are straight, the MSA is rectangular in shape and that it is difficult to provide coverage to corners of the MSA without some extension beyond the MSA boundary. [3] GTE argues that it will not be able to secure a significant number of RSA customers because the extension does not reach any major population center within the RSA, and it covers only 0.6 percent of the total RSA population. GTE also states that the Carey contour shows no coverage of I-65 beyond the MSA boundary, and that any diversion of roamer traffic should be minimal. In addition, GTE argues that a decrease in the contour near I-65 will result in greatly diminished coverage elsewhere in the MSA. Finally, GTE argues that its application contained an adequate explanation for the extension. The application stated that the cell 1 modifications were necessary to provide improved coverage to the southern and eastern portions of Tippecanoe County, and state highways 25 and 26, within the MSA, and were not intended to serve areas outside the MSA.

II. DISCUSSION

4. In *Procedures Update*, 52 Rad. Reg. 2d (P&F) 725 (1982), *aff'd. Cellular Radio Service*, 56 Rad. Reg. 2d (P&F) 1583 (1984), and in Section 22.903(a) of the rules,[4] the Commission established guidelines for configuring 39 dBu contours. The Commission stated that 39 dBu contours should be contained entirely within the MSA or NECMA, but that a *de minimis* extension beyond the CGSA would not render an application defective if the application included "a specific explanation of why it was necessary to engineer the particular cell(s) such that the 39 dBu contours could not be kept entirely within the SMSA (or NECMA)."[5] In evaluating the explanation, we take a variety of factors into account, such as the terrain and population of the area in question, the shape of adjoining boundaries and any extenuating engineering problems. In analyzing applications which propose contour extensions, we look first to see if the extension is minor, and then to see if there is a specific engineering explanation. *See, e.g., Saco River Cellular Telephone Company*, 2 FCC Rcd 2009 (Mob. Serv. Div. 1987); *Metroplex Telephone Company*, 2 FCC Rcd 7301 (Mob. Serv. Div. 1987); *GTE Mobilnet of South Texas Limited Partnership*, 4 FCC Rcd 1657 (Mob. Serv. Div. 1989).

5. The proposed extension here is small in size, amounting to only 5.06 percent of the total cell area,[6] and only 3.9 percent of the MSA.[7] Although the MSA boundaries are straight, GTE indicates that there is no technically feasible way to serve all portions of the rectangularly shaped MSA without some extension beyond the MSA boundary. Furthermore, GTE will not serve a significant number of RSA customers as its proposed extension does not cover any major population centers in the RSA, and covers only 0.6 percent of the total RSA population. As to coverage along I-65, we note that the Carey contour shows no coverage beyond the MSA, the alternative study shows only three miles of such coverage, and a contour reduction near I-65 will significantly decrease service elsewhere in the MSA. Finally, the application states that the cell 1 modification is necessary to serve specific areas and highways within the MSA, and includes a map showing the areas and highways mentioned, the current and proposed 39 dBu contours and the MSA boundary. We find that this explanation is sufficiently specific to meet the requirements set out in *Procedures Update*, 52 Rad. Reg. at 726.[8] Based on these considerations, we find that the extension is *de minimis* and permissible.[9]

6. In addition, we find GTE fully qualified to effectuate its proposal and that granting the instant application to make modifications to cellular station KNKA593 would serve the public interest, convenience and necessity.

III. ORDERING PARAGRAPHS

7. Accordingly, IT IS ORDERED that the application (File No. 04902-CL-MP-90) of GTE Mobilnet of Indiana Limited Partnership IS GRANTED. This authorization does not include the right to any interference protection in any areas outside the Lafayette, Indiana MSA and is conditioned upon coordinating with the current and future co-channel licensees in the areas outside the MSA. The licensee herein is put on notice that in the event current or future MSA/RSA licensees encounter interference from any extensions, the licensee herein will have to change frequencies in those cells or pull back its 39 dBu contours to eliminate any interference due to an extension.

8. IT IS FURTHER ORDERED that the petition to deny filed by Indiana RSA 4 Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] The proposed contour for cell 2 will also extend beyond the MSA boundary and into the adjacent Indiana 1 - Newton RSA and Indiana 5 - Warren RSA. No objections to this extension have been filed, and we find the extension to be *de minimis*.

[2] The standard Carey contour, as defined in Section 22.903(c) of the rules, does not show any coverage of I-65 beyond the MSA boundary. However, ILP has submitted an alternative propagation study showing some additional coverage along I-65.

[3] GTE further states that it is currently using a directional antenna, that is designed to give the best possible coverage with no extension. GTE states that this design leaves parts of the MSA poorly covered, and that it is now proposing an omnidirectional antenna to provide improved service within the MSA. GTE argues that there are no technologically feasible means for covering the MSA without some extension into the RSA.

[4] Section 22.903(a) states in pertinent part:

> The Cellular Geographic Service Area (CGSA) of the cellular system shall be defined by the applicant as the area intended to be served. No CGSA, which includes areas within a Metropolitan Statistical Area (MSA), or in New England, a New England County Metropolitan Area (NECMA), as modified in paragraph (e), of this section, below, may extend beyond the boundaries of the MSA or NECMA, except where any such extensions are *de minimis* and do not include areas within another central MSA or NECMA.

[5] *Procedures Update*, 52 Rad. Reg. 2d at 726.

[6] *See, e.g, Houston Cellular Telephone Company*, 5 FCC Rcd 7140 (Mob. Serv. Div. 1990) (19.8 percent cell extension is *de minimis)*; *Rhys G. Mussman*, 3 FCC Rcd 6808, 6811 (Com. Car. Bur. 1988) (19 percent cell extension is *de minimis)*; *South Carolina Metronet, Inc.*, DA 91-168, released February 19, 1991 (16.7 percent cell extension is *de minimis)*.

[7] *See e.g., Saco River*, 2 FCC Rcd at 2009 (6 percent of New England County Metropolitan Area (NECMA) is *de minimis)*; *New York Cellular Geographic Service Area, Inc.*, 5 FCC Rcd 3819 (Mob. Serv. Div. 1990) (5 percent of MSA is *de minimis)*.

[8] *See e.g., GTE Mobilnet of South Texas*, 4 FCC Rcd at 1657. *Cf., Round IV Cellular Applications*, 103 FCC 2d 171, 177-83 (1986) (statements which did not specify particular cells, or particular areas needing coverage, failed to provide adequate explanation for proposed 39 dBu contour extensions), *aff'd mem.*, 813 F.2d 472 (D.C. Cir. 1987).

[9] ILP also argues that GTE refused to agree to reciprocal cell extensions, and that this refusal indicates GTE is actually trying to serve parts of the RSA. GTE responds that a formal request for reciprocal extensions was not made until after the petition was filed. For the reasons indicated herein, we find that GTE's proposed extension results from efforts to provide service within the MSA. Any proposed extensions by ILP will be considered when formally presented to the Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 5, 1991

ADVISORY COMMITTEE ON ADVANCED TELEVISION SERVICE

A meeting of the Advisory Committee on Advanced Television Service will be held on:

April 1, 1991
2:00 P.M.
Public Broadcasting Service
1320 Braddock Place
Sixth Floor Conference Room
Alexandria, VA

The agenda for the meeting will consist of:

1. Introductory Remarks
2. Treasurer's Report
3. Report of the Testing Laboratories
4. Subcommittee Reports
5. Consideration of the Fourth Interim Report
6. Other Business
7. Adjournment

All interested persons are invited to attend. Those interested also may submit written statements at the meeting. Oral statements and discussion will be permitted under the direction of the Advisory Committee Chairman.

Any questions regarding this meeting should be directed to Richard E. Wiley at (202) 429-7010 or William H. Hassinger at (202) 632-6460.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-382

In re Applications of

WWOR-TV, INC. File No. BRCT-871221KE

For Renewal of License of Station
WWOR(TV), Secaucus, New Jersey

and

GARDEN STATE BROADCASTING LIMITED PARTNERSHIP File No. BPCT-871223KG

For Construction Permit
Secaucus, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: March 1, 1991; Released: March 4, 1991

By the Commission:

I. BACKGROUND

1. In a Partial Initial Decision, released on January 11, 1991, Administrative Law Judge Richard L. Sippel approved a proposed settlement in the above-captioned case that pays Garden State Broadcasting Limited Partnership ("Garden State") $2 million to dismiss its challenge to the renewal of the license of WWOR(TV), held by WWOR-TV, Inc. ("WWOR-TV"). In so doing, the ALJ resolved an abuse of process issue in favor of Garden State, finding that the record as developed did not support a finding (a) that Garden State's application lacked *bona fides* when it was filed; (b) that Garden State's application was filed for the purpose of reaching or carrying out a settlement agreement; (c) that Garden State abused the Commission's processes through its application or otherwise, or (d) that Garden State misrepresented or lacked candor in certifying that it did not file its application for an improper motive or with a lack of good faith.[1]

2. Section 311(d)(3) of the Communications Act specifies that the Commission shall approve a settlement agreement in a comparative proceeding only if it determines that the agreement is in the public interest, and that no party to the agreement filed its application for the purpose of reaching or carrying out a settlement agreement. Because of the Commission's expressed concerns regarding abuse of process and its detrimental effects on licensing procedures that serve the public interest,[2] we have reviewed the record in this case on our own initiative, pursuant to 47 C.F.R. § 1.276(b) of the Commission's rules.[3] Based upon that review, we conclude that the current record is insufficient to determine whether Garden State filed its application in good faith, and therefore remand the proceeding to the ALJ for further evidentiary hearings as outlined below.

II. DISCUSSION

3. Jean Wells, the general partner of Garden State, was also the general partner of Mainstream Television Limited Partnership ("Mainstream"). On March 31, 1986, Mainstream tendered an application for a construction permit for a new TV station on Channel 9 in Secaucus, New Jersey simultaneously with a petition requesting that the then licensee of WOR(TV), RKO General, Inc. ("RKO"), be required to file an early renewal application and that Mainstream's application be accepted and processed with RKO's renewal application. On June 4, 1986, RKO filed an application for consent to assignment of license for WOR-TV to WWOR-TV, Inc., a wholly-owned subsidiary of MCA. On July 14, 1986 Mainstream filed a petition to deny the assignment.[4]

4. On December 9, 1986, the Commission issued a decision granting the assignment, denying Mainstream's petition to deny, and refusing to accept Mainstream's application.[5] Mainstream appealed the decision to the United States Court of Appeals for the District of Columbia Circuit. On March 2, 1987 RKO and Mainstream settled the case, with RKO paying Mainstream to drop all challenges to the transfer to MCA. On April 1, 1987, Mainstream received a payment of $5.37 million.

5. MCA began operating Channel 9 on April 3, 1987.[6] Sometime between April 15, 1987 and July 16, 1987 Wells informed her counsel that she believed that the progamming of WWOR-TV was not responsive to the needs of Northern New Jersey.[7] This observation led to the formation of Garden State to challenge the renewal of WWOR-TV. All present at the meeting at which the decision was made to challenge the renewal of WWOR-TV claim that they are unable to remember when the meeting occurred.[8] However, the record established that by July 16, 1987, all of the limited partners for the Garden State venture had been identified.[9] A documented decision to form Garden State as a limited partnership to challenge the renewal of WWOR-TV had been made as of July 23, 1987,[10] three months after Mainstream had received its $5.37 million settlement.

6. Pointing to the proximity between Garden State's challenge to the renewal of the license of WWOR-TV and the Mainstream settlement, WWOR-TV sought addition of an abuse of process issue against Garden State to determine whether Garden State filed its application for the improper purpose of securing a settlement.[11] The issue was added.[12] When the parties filed their proposed settlement agreement, the ALJ determined that it was necessary to resolve the abuse of process issue in order to approve the settlement in accordance with Section 311(d)(3)(B) of the Communications Act.

7. After conducting hearings on the abuse of process issue and receiving Proposed Findings of Fact and Reply Findings of Fact from the parties, the ALJ initially concluded that the evidence failed to establish that Garden State filed its application for the purpose of securing a settlement.[13] While we agree with the ALJ that the present record does not conclusively establish that Garden State abused the Commission's process by filing its ap-

plication for the purpose of settlement, we are not persuaded by several of the ALJ's conclusions given the limited scope of the current record.

8. Our main concern focusses upon the credibility of Garden State's witnesses and the weaknesses identified by the ALJ and Mass Media Bureau. Certain troubling aspects of the hearing record, most notably repeated significant memory lapses of Garden State's witnesses, bear close examination. The ALJ recognized the troubling aspects of Garden State's presentation, but concluded that they were offset by Garden State's vigorous litigation.[14] For example, the ALJ initially concluded that "the evidence showing the nature and extent of Garden State's participation in the pre-hearing and hearing phases of this case establishes that its application was not frivolous or intended to harass."[15] The actions cited by the ALJ in support of this conclusion, however, consist of a lengthly list of pleadings filed to prevent or delay discovery on the abuse of process issue itself.[16] We do not agree that this necessarily supports a conclusion that Garden State's motives in filing its application were *bona fide*. In addition, we do not agree with the ALJ that the fact that Garden State expended $30,000 for technical and expert assistance, shortly after its principals had received the $5.37 million settlement from RKO, necessarily supports a finding that Garden State's motives were *bona fide*.[17]

9. The ALJ further concluded that it would not have been reasonable or rational to assume that settlement was a viable option for Garden State until there was "an exchange of evidence, deposition discovery, and an offer to settle was made by the renewal applicant."[18] A conclusion that a party could not rationally hope for or anticipate a settlement until discovery has occurred appears to negate the possibility of ever finding that an applicant filed with the intent to settle. Moreover, it ignores the fact that the same general partner [Wells] and the controlling limited partner [Fetner] had recently participated in a substantial settlement related to the same station.

10. Based upon our preliminary review, we do not believe that the record as developed thus far is sufficient to conclude that Garden State did not file its application with an intent to enter into a settlement agreement. We believe that there are additional areas of inquiry that the parties did not address that are necessary to resolve this issue.

11. In a *Memorandum Opinion and Order*, FCC 88M-3567 released October 25, 1988, the ALJ designated financial certification and financial qualifications issues against Garden State based upon an alleged lack of efforts to negotiate the requisite rental agreement (including the substantial cost thereof) for Garden State's proposed antenna site. Garden State did not deny assertions that it failed to contact knowledgeable persons at WWOR-TV or Port Authority, the owner of the antenna site.[19] This suggests that Garden State did not intend to seriously attempt to obtain the license when it filed its application. The ALJ has not resolved this question, and it is unclear, from the record whether Garden State took requisite steps to support its financial certification, thereby demonstrating a serious intent to pursue its application. While it is not necessary to resolve the financial qualifications issue against Garden State to approve a settlement,[20] we believe that evidence concerning the *bona fides* of the financial certification is directly relevant to ascertaining whether Garden State filed its application in good faith. Thus, we are remanding this proceeding to the ALJ to gather further information related to Garden State's intent when it filed its application by resolving questions related to Garden State's financial certification and the steps it took in preparing its application that support its position that it filed the application in good faith, with a serious intent to obtain the license for Channel 9. We believe that this additional information is necessary to resolve the question of whether, based upon the totality of the evidence gathered in this proceeding, Garden State's intentions were *bona fide* when it filed its application.

III. ORDERS

12. ACCORDINGLY, IT IS ORDERED, That the Partial Initial Decision IS SET ASIDE, and the settlement agreement IS HELD IN ABEYANCE pending further hearings.

13. IT IS FURTHER ORDERED, That the record in the above captioned proceeding is REOPENED and REMANDED to the presiding Administrative Law Judge for further hearings in accordance with this Memorandum Opinion and Order, and for the preparation of a Supplemental Initial Decision.[21]

14. IT IS FURTHER ORDERED, That the ALJ IS DIRECTED to expedite the further hearings ordered herein as quickly as possible and that exceptions to the Supplemental Initial Decision SHALL BE FILED directly with the Commission.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *WWOR - TV, INC.*, Partial Initial Decision of Administrative Law Judge Richard L. Sippel, MM Docket No. 88-382, FCC 91D-1, released January 11, 1991 (hereinafter "Partial Initial Decision"), at Paragraph 58.

[2] *Memorandum Opinion and Order in BC Docket No. 81 - 742*, 5 FCC Rcd 3902 (1990).

[3] Section 1.276(a) of the Rules gives parties 30 days following public release of the initial decision within which to file exceptions to that decision. If no exceptions are filed, the initial decision becomes final 50 days after its public release unless the Commission "on its own initiative provide[s], by order adopted not later than 20 days after the time for filing exceptions expires, that an initial decision shall not become final, and that it shall be further reviewed or considered by the Commission." 47 C.F.R. §1.276(a). No exceptions to the initial decision were received by February 11, 1991, the deadline for filing exceptions in this case.

[4] Partial Initial Decision at Paragraphs 10, 24.

[5] *RKO General, Inc. (WOR - TV)*, 1 FCC Rcd 1081 (1986).

[6] Partial Initial Decision at Paragraph 30.

[7] Partial Initial Decision at Paragraph 32.

[8] Partial Initial Decision at Paragraphs 32-34. Both the ALJ and the Mass Media Bureau expressed concern over Garden State's purported inability to pinpoint this crucial date. *See* Partial Initial Decision at Paragraph 55. If Garden State had

established that it decided to challenge the renewal of WWOR-TV after monitoring the station's programming for a reasonable period of time and then determining that WWOR-TV was not responsive to the needs of Northern New Jersey, it would have greatly enhanced its argument that its challenge was *bona fide*. Garden State's purported inability to narrow down this time frame in any useful way, along with its witness' testimony that their only specific recollection of the meeting was that settlement was not discussed, raises serious questions concerning its intent.

[9] Partial Initial Decision at Paragraph 36.

[10] *Id.*

[11] First Motion to Enlarge Issues seeking lack of capacity, abuse of process, improper motive, and related misrepresentation/lack of candor issues against Garden State Broadcasting Limited Partnership, filed by WWOR-TV on August 31, 1988.

[12] *Memorandum Opinion and Order*, MM Docket No. 88-382, FCC 88M-3576, released October 25, 1988.

[13] Partial Initial Decision at Paragraph 41.

[14] Partial Initial Decision at Paragraph 55.

[15] Partial Initial Decision at Paragraph 50.

[16] *Id.*

[17] *See* Partial Initial Decision at Paragraphs 43, 55 and 59.

[18] Partial Initial Decision at Paragraph 51.

[19] *Memorandum Opinion and Order*, MM Docket No. 88-382, FCC 88M-3567, released October 25, 1988.

[20] *See Allegan County Broadcasters, Inc.*, 83 F.C.C. 2d 371 (1980) (holding that basic qualifying issues need not be resolved in order to approve a settlement).

[21] We note that in discussions held during the prehearing conference, the ALJ indicated that if, at the close of the proceedings, he determined that Garden State had abused the Commission's processes by filing an application for the purpose of settlement, he may consider issuing a ruling that Garden State lacks the requisite qualifications to be a Commission licensee and would deny Garden State's application outright without further hearing. The parties disputed whether such a ruling would be procedurally appropriate. Transcript at pages 957 - 976. In the event that the ALJ determines that Garden State filed its application for the purpose of settlement, thereby abusing the Commission's processes, we agree with the ALJ that due to the special circumstances presented by a finding of abuse of process, no useful purpose would be served by requiring further hearings in this case and that denial of the application would be proper. *See RKO General, Inc.*, 61 F.C.C.2d 1062, 1064 (1976).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-357

In re Applications of

PALMETTO COMMUNICATIONS COMPANY
WDIX, Yadkinville, North Carolina

File No. BP-870331BK

For a Construction Permit
for a Modification of Facilities

TRIAD NETWORK, INC.
Greensboro, North Carolina

File No. BP-870928AA

For a Construction Permit
for a New AM Station

Appearances

Peter Gutmann, Esquire, on behalf of Palmetto Communications Company, *Stephen T. Yelverton, Esquire*, on behalf of Triad Network, Inc; and *Larry A. Miller, Esquire*, on behalf of the Mass Media Bureau.

DECISION

Adopted: March 1, 1991; Released: March 15, 1991

By the Review Board: BLUMENTHAL and ESBENSEN. Chairman MARINO absent.

Board Member BLUMENTHAL.

1. This proceeding turns on an issue rooted in Section 307(b) of the Communications Act of 1934, as amended: whether an applicant seeking to modify an existing AM station licensed to Yadkinville, North Carolina, a rural community near the larger cities of Winston-Salem and Greensboro, is entitled to a dispositive preference because its proposal would result in the first complete nighttime transmission service for the smaller community. We affirm the determination of the *Initial Decision* of Administrative Law Judge Edward J. Kuhlmann (ALJ), 5 FCC Rcd 5154 (1990) (*I.D.*), that such a dispositive preference is warranted, as we hereinbelow review: (a) the exceptions to the *I.D.*, filed on September 12, 1990 by Triad Network, Inc. (Triad); (b) the contingent exceptions filed on September 12, 1990 by Palmetto Communications Company (Palmetto); (c) the reply pleadings filed on September 26, 1990 by Triad, Palmetto and the Mass Media Bureau; and (d) the supplement to Triad's exceptions filed on January 2, 1991, and Palmetto's opposition thereto filed on January 4, 1991.

BACKGROUND

2. Yadkinville, with a 1985 (estimated) populated of 2,293, is the county of seat of Yadkin County, and is located in the northern Piedmont section of the state. Two substantial North Carolina cities are in the vicinity: Winston-Salem (population 131,885) lies 20 miles to the east; and Greensboro (population 193,850) lies 45 miles to the east. Yadkinville now has one broadcast station, WDIX(AM) (previously WYDK (AM)), a Class III-S facility (previously) licensed to the Childress Radio Company (Childress), and operating on 1480 kHz with 1,000 watts of power during the day but only 27 watts (nominal) at night. The station's post-sunset authority is classified as "secondary," and is not protected from harmful interference caused by other broadcast stations. At peak operation at night, it would cover merely 43% of the population of Yadkinville, [1] and only a corresponding percentage of the city's land area (1.55 out of 3.56 square kilometers). *I.D.*, para. 8. WYDK went silent on January 10, 1988, pursuant to Commission authorization, because of financial problems; prior thereto, however, Childress filed its instant application to (1) change frequencies from 1480 kHz 1470 kHz; (2) increase daytime power to 2.5 kilowatts; and (3) increase nighttime power to 700 watts. That nighttime power increase would enable WYDK to provide interference-free service to all of Yadkinville.

3. On September 28, 1987, Triad filed a mutually exclusive application for a new AM station on 1470 kHz at Greensboro, North Carolina. A station previously operating on 1470 kHz at Greensboro, WBIG(AM), had gone off the air. Because of their mutual exclusivity, the Triad and Childress applications were designated for a comparative hearing on August 22, 1989. *Hearing Designation Order*, 4 FCC Rcd 6512 (1989). Eight days later, Childress filed an application to assign its license for WYDK to Palmetto, which assignment was granted by the Mass Media Bureau on November 1, 1989. Palmetto assumed control of the station and returned it to the air as WDIX(AM). Pursuant to Section 73.3571(j)(3) of the Commission's rules, the ALJ permitted Palmetto to succeed Childress in this hearing, *see Memorandum Opinion and Order*, FCC 89M-2822, released December 22, 1989. In so ruling, the ALJ dismissed as moot several motions filed by Triad to dismiss Palmetto's application, because they would have pertained (potentially) only to Childress. The hearing occurred on January 22, 1990, and consisted only of the receipt of written exhibits.

SECTION 307(b) ISSUE

4. The *I.D.* resolved this case solely upon the Section 307(b) issue. [2] Specifically, the ALJ concluded that because Palmetto's proposal would provide the first nighttime transmission service to Yadkinville, compared with Triad's provision of an *eighth* transmission service to Greensboro, a grant of this Construction Permit to Palmetto "would better provide a fair, efficient and equitable distribution of radio service." *I.D.* at para. 19. Moreover, the *I.D.* found that, since both Yadkinville and Greensboro already received at least five radio services during the day and night, the transmission service preference was dispositive. The *I.D.* therefore rejected Triad's argument that Greensboro should receive the 1470 kHz grant simply because that frequency had been so alloted since 1926. The *I.D.* likewise rejected Triad's assertion that a Section

307(b) preference for Yadkinville was inappropriate because that community was actually part of the much larger city of Greensboro. *Id.*

EXCEPTIONS

5. Triad first contends that the improved nighttime service to Yadkinville inherent in Palmetto's proposal does not, in and of itself, consitute a newly created transmission service for Yadkinville. Second, Triad contends that it is technically possible for WDIX to provide full-time service to Yadkinville on its present 1480 kHz frequency, albeit with a higher power of 270 watts. Alternatively, Triad argues that, with the station's current 27 watts, complete nighttime coverage could also be obtained on 1480 kHz, if WDIX moved its transmitter site. And, Triad claims that the ALJ improperly rejected its proffered engineering exhibits which would have demonstrated the possibility that Palmetto could service Yadkinville on 1480 kHz, with Triad serving Greensboro on 1470 kHz, thereby avoiding what Triad characterizes as Palmetto's "artificial manipulation of the Commission's Section 307(b) policies . . . ." Next, Triad invokes *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951) and *New South Broadcasting Corp. v. FCC*, 879 F.2d 867 (D.C. Cir. 1989), with the argument that Yadkinville is a "stagnant and small community," actually part of Winston-Salem and Greensboro, and thus unentitled to a Section 307(b) preference. In this regard, Triad references three *Huntington* criteria -- proposed expanded signal coverage; the relative size and promixity of Yadkinville to the larger cities; and the interdependence of Yadkinville with those cities -- to conclude that Yadkinville is "too insignificant" to be awarded a Section 307(b) preference. Triad's final argument is that the better result under Section 307(b) is the status quo, to wit, the continued use of 1470 kHz in Greensboro by it, and the continued operation of WDIX with its present limitations.

6. Triad's other exceptions concern Palmetto's replacement of Childress in this proceeding. First, Triad contends that Palmetto violated Section 311(a)(2) of the Communications Act, 47 U.S.C. 311(a)(2), by not publishing a new local public notice before the start of the hearing to supplement Childress's previous local notice. Second, Triad excepts to the *Memorandum Opinion and Order*, FCC 89M-2822, *supra*, which discarded Triad's Motion to Dismiss Palmetto's application. In that motion, Triad had contended that Childress had no intention of constructing its proposed station, as evidenced by the fact that WYDK went silent. Triad maintained then, and now, that Childress possessed no *bona fide* intent to construct its proposed facility, but instead filed its application "as a marketing device," resulting in the (successful) assignment to Palmetto. Triad further excepts to the dismissal of its prior requests for financial qualifications and abuse of process issues against Childress, claiming that Childress was financially unqualified to construct its proposed station; or, assuming that Childress was financially qualified, it took WYDK off the air improperly. Next, Triad excepts to the dismissal of its demand for an unauthorized transfer of control issue against Childress and Palmetto, asserting that since Palmetto has paid the hearing fee and agreed to perform certain engineering tasks concerning the 1470 kHz application, Palmetto impermissibly exercised *de facto* control over the Childress application in violation of 47 U.S.C. § 310(d). Triad also points to a provision in the purchase contract in which Childress agreed to provide Palmetto with technical and financial assistance after the assignment of the license to Palmetto. Lastly, Triad contends that the Childress amendment requesting Palmetto's substitution for Childress in the proceeding was improperly filed under Section 73.3571(j)(3) of the Commission's rules. It argues instead that "a good cause" showing, under Section 73.3522(b)(1) of the rules, was required, but could not be made in view of Palmetto's voluntary acquisition of the Childress application. It claims tardiness and prejudice to it in the assignment.

7. As to Section 307(b), Palmetto replies that because a majority of Yadkinville's area and population is not now reached by WDIX, its improved coverage would plainly constitute a first nighttime transmission service. It rejects as unprecedented Triad's suggestion that alternative modes of operation be explored in order to determine whether WDIX could better cover Yadkinville on 1480 kHz. And, relying upon *Faye & Richard Tuck, Inc.*, 3 FCC Rcd 5375 (1988), Palmetto contends that the factors set forth therein compel a conclusion that Yadkinville deserves Section 307(b) preference.[3]

8. With regard to the assignment of the station, Palmetto rejoins first that (with Childress) a joint notice of the upcoming hearing was published in the *Yadkin Ripple*, a weekly newspaper, albeit one week later than required by Section 73.3594(g). Second, as to the claim that Childress never intended to construct on 1470 kHz, Palmetto interposes the October 20, 1989 Declaration of James Childress, averring a consistent intent to construct the modified facility and explaining that mounting financial losses (along with his daughter's illness) caused the cessation of WYDK's operation. Insofar Triad's claim that Childress was financially unable to build the modified facility, Palmetto maintains that no formal financial showing was required; and that, in any event, Triad is merely speculating as to the ability of Childress to have funded the modification, if he so chose. Palmetto contends that Triad is similarly speculating that, because WYDK went off the air, its owner was unqualified. Rather, Palmetto states that "[a] voluntary business decision to suspend operations, authorized by the Mass Media Bureau, does not necessarily equate to an inability to operate." Finally, Palmetto denies that its own financial and engineering assistance to Childress prior to its acquisition of the station constituted a premature assumption of control, and it submits that Section 73.3571(j)(4) of the rules allowed Palmetto to retain Childress's cut-off status in this proceeding.

DISCUSSION

9. Section 307(b) of the Communications Act requires the Commission to "make such distribution of licenses. . . among the several States and communities as to provide a fair, efficient and equitable distribution of radio service . . . ." This mandate impels the Commission to determine whether one community is substantially favored over another, before addressing the subsidiary comparative qualifications of the applicants. *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358 (1955). Under precedent, we first seek to determine a community's need for its own transmission service as an outlet for local expression. *Kent-Ravenna Broadcasting Co.*, 44 FCC 2603, 2606 (1961).[4] Normally, the applicant proposing to provide its community with a first local outlet will prevail over one proposing merely to

add to another community's existing multiple outlets. *See Pasadena Broadcasting Co. v. FCC*, 555 F.2d 1046, 1050-51 (D.C. Cir. 1977). Moreover, the priority of a first local transmission service encompasses a daytime-only station's proposal to provide its community with its first nighttime service. *Suburbannaire, Inc.*, 104 FCC 2d 909 (Rev. Bd. 1986). Because both the Palmetto and Triad proposals will cover already well-served reception areas (*i.e.*, areas presently receiving at least five fulltime radio services), the reception aspect of Section 307(b) is not dispositive of a preference here.

10. Palmetto's proposal will provide a first complete fulltime local transmission service to Yadkinville, and we reject Triad's multifarious arguments to the contrary. Thus, Triad's view that WDIX already provides an adequate nighttime service to Yadkinville is factually and legally infirm. Under established Commission technical guidelines, *see supra* note 1, Yadkinville's presently authorized nighttime power (27 watts), which covers less than half of the city and is subject to destructive interference from other stations, does not constitute adequate nighttime service to the city. *See Broadcast Station Assignment Standards*, 39 FCC 2d 645, 670 (1973); *cf. Channel 32 Broadcasting Co.*, 5 FCC Rcd 7373, 7374 (Rev. Bd. 1990) (television coverage below 80% of city of license's area is inadequate absent a waiver). In that regard, the Commission considers the extent of existing community coverage critical to the question of whether an applicant is entitled to a 307(b) preference for bringing a first local *transmission* service to that city. *Valley Broadcasters, Inc.*, 5 FCC Rcd 2785, 2788 (1990); *Faye & Richard Tuck, Inc.*, 3 FCC Rcd 5374, 5375 (1988). Because WDIX's presently authorized nighttime power provides service to only 43% of its area and population, the station does not now provide a complete nighttime transmission service. Its instant proposal would cure the deficiency.

11. Moreover, while Triad contends that because WDIX could provide adequate nighttime service to Yadkinville on its present frequency *if* that station increased power and/or relocated its transmitter, it cites no authority whatever for its proposition that the Commission is bound to consider hypothetical technical proposals in making its licensing decisions. Indeed, it is generally held that the opposite is true. *See, e.g., Darrell E. Yates*, 2 FCC 2d 130 (Rev. Bd. 1965). The two cases that Triad invokes are inapposite. In *Elijah Broadcasting Corporation*, 5 FCC Rcd 5350 (1990), the Commission simply expressed concern about what an applicant's maximum coverage could be, but that concern arose purely in the context of a possible application of the *Huntington* doctrine which (as discussed *infra)* is inapplicable here. Triad's citation to a Rule Making *Report and Order (Anchorage, Alaska)*, 5 FCC Rcd 7570 (1990), issued by the Mass Media Bureau's Policy and Rules Division, is also misplaced. Although that Media Bureau Rule Making mentioned, *en passant*, the availability of other television channels for possible use in a small community (which lost out to a nearby larger community for a VHF television allocation), the disposition there turned on a host of other factors. These included the demonstrable need for the TV channel in the larger community, the interdependence of the smaller community with the larger city, and the Commmission's historic policy of allotting VHF channels *only* to large cities. 5 FCC Rcd at 7571. None of the reasons for that particular VHF television allocation appertain directly to the instant case.

12. We also reject Triad's attempted refuge in the *Huntington* doctrine. As always, a party seeking to apply *Huntington* to a community lying beyond an "urbanized area" bears a stout burden to show interdependence with some larger city. *Faye & Richard Tuck, Inc., supra*, at 5380. Yadkinville is not within the Winston-Salem "urbanized area."[5] Nor did Triad submit at the hearing probative evidence regarding the inseparable relationship of Yadkinville to any larger city, beyond a demographic profile of its own proposed city of license, Greensboro. *See* Triad Exh. 3. Thus, Triad failed utterly to meet its *Huntington* burden. *Compare RKO General, Inc. (KFRC)*, 5 FCC Rcd 3222 (1990) (San Francisco applicants defeat Richmond, California).

13. In clarifying *Huntington*, the more recent *Faye & Richard Tuck, Inc.* held that interdependence with a larger "urbanized area" is the most important of three discrete criteria, the other two being: (a) the size and proximity of the specified city to a "central city"; and (b) the proposed signal population coverage. *See* 3 FCC Rcd at 5377. Regarding "interdependence," eight separate factors are relevant:

> (1) the extent to which community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper on other media that covers the community's local needs and interests; (3) whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services.

As observed by the Mass Media Bureau, the instant record is silent as to factors (1), (3), (5) and (7) above. But, the following factors favor Yadkinville: (a) it has three local newspapers (and WDIX(AM)); (b) it has its own local government and elected officials; (c) it has numerous commercial establishments, and a major medical facility; and (d) it provides most of its own municpal services. Conversely, the record evidence fails to establish that Yadkinville is inextricably annexed to either Winston-Salem or Greensboro.[6] Moreover, Palmetto's proposed operation of WDIX will *not* place a primary daytime service contour of 2mV/m, or a nighttime service contour of 6.7 mV/m, over Winston-Salem, the city closest to Yadkinville. Triad Ex. 4, pp. 26, 31. And, contrary to Triad's contention, application of the "Quiet Village" doctrine is not warranted either. Yadkinville has sufficient hallmarks of a community, and no community has here been shown to have a greater need for a new service. *Compare, e.g., New South Broadcasting Corp., supra* (no Section 307(b) preference ceded to a community which was unincorporated, had no defined boundaries, and no local government).

14. Under Section 307(b), Yadkinville is clearly entitled to a statutory preference and a first full nighttime transmission service over Triad's alternative quest for redundancy for Greensboro.

OTHER MATTERS

15. Regarding Palmetto's basic qualifications, we rebuff the claim that Palmetto should be disqualified for defective local public notice. As explained in its December 13, 1989 Petition for Leave to File Supplementary Notice of Publication, Childress had published local notice of the hearing on September 14, 21, and 28, 1989; and, on those same dates, Childress had published local notice of the filing of its application to assign WYDK to Palmetto. Though Palmetto did not itself publish local notice of the hearing (*see* Section 73.3597(h) of the rules), we find that the publication of Childress's two local notices substantially comports with the intent of Section 311(a)(2) of the Communications Act by informing the local population of the matters before the FCC. *See Brookhaven Broadcasting Co., Inc.*, 50 FCC 2d 703, 705-06 (Rev. Bd. 1975) (minor, isolated violation of public notice rules excused).

16. We also reject Triad's postulate that, because Childress never intended to construct the station, Palmetto must be disqualified. WYDK went silent on January 10, 1988, three months after Triad filed its competing application. It did remain so until acquired by Palmetto in November 1989, during the course of this hearing. Apart from this sequence, Triad proffers no additional evidence in support of its conjecture that Childress's application to upgrade WYDK was merely a "marketing device" which fortuitously found a successful suitor in Palmetto. Unlike the applicant that admittedly never intended to construct an AM station for which it had received a valid Construction Permit in *Land O' Lakes Broadcasting Corporation*, 4 FCC Rcd 344 (1989), the actions of Childress do not confirm Triad's assertion of *mala fides*. Rather, as avowed by James Childress, he was understandably dissatisfied with the inferior technical (and financial) condition of WYDK as it was then operating. When Greensboro's WBIG went off the air, making 1470 kHz available in Yadkinville, Childress promptly filed for the frequency in March 1987. But, in light of continuting financial losses every month, and the illness of WYDK's general manager, he opted to take the station off the air pending the grant of the 1470 kHz application. On the face of it, we cannot reasonably conclude that Childress would not have constructed the modified station, notwithstanding his subsequent assignment to Palmetto.

17. Triad uses this same sequence to assert that Childress was either financially unqualified to construct the modified station; or, if financially qualified, abused the Commission's processes by taking the station off the air. Palmetto counters that WYDK was a marginal operation, which properly sought Commission permission to go silent because of financial difficulties. And Triad supplied no evidence to support its claim that Childress could not have financed its proposed improvements. In the absence of solid evidence to the contrary, there is no basis for a financial qualifications or abuse of process issue. Again, speculation cannot supplant substance.

18. Triad overreaches also in its attempt to portray Palmetto as assuming premature control of WYDK and in claiming that Childress maintained control after Palmetto's acquisition of the station. It is well-settled that the totality of circumstances must be considered before determining whether an unauthorized transfer of control has occurred. *Blue Ribbon Broadcasting, Inc.*, 90 FCC 20 1023, 1025 (Rev. Bd. 1982). The three most important factors in determining who controls a station are finances, personnel, and programming. *News International, PLC*, 97 FCC 2d 349, 358 (1984). And, the established test for determining whether an entity is a real-party-in-interest is whether that entity owns, or will be in a position to own or control, the station. *RKO General, Inc.*, 4 FCC Rcd 4679, 4695 (Rev. Bd. 1989).

19. Palmetto's payment of Childress's hearing fee, while Childress was still WYDK's licensee, does not by itself establish a *de facto* assumption of control by Palmetto. *Compare Silver Star Communications – Albany, Inc.*, 3 FCC Rcd 6342, 6347 (Rev. Bd. 1988) (prospective purchaser controlled station's finances and provided his own funds to operate station). Significantly, the payment was fully disclosed by Childress and Palmetto. *See* Petition for Leave to Amend, filed November 30, 1989. *Compare Stereo Broadcasters, Inc.*, 87 FCC 2d 87 (1981) (unauthorized transfer accompanied by misrepresentations and lack of candor). Nor was Palmetto's agreement to perform field strength measurements on the Triad application indicative of Palmetto's *de facto* control of the Childress application. Triad does not claim that Palmetto ever conducted these tests, or even that Palmetto was obligated to provide the results thereof to Childress. Indeed, the agreement would have been a prudent concomitant to the assignment. Altogether, Triad has failed to demonstrate *de facto* control of WYDK by Palmetto before November 1989.

20. Triad has failed, conversely, to demonstrate that Childress himself retained an improper interest in the station, *after* it passed to Palmetto. Its argument focuses on paragraph 2D of the sales agreement, which states that "[t]he Seller agrees to provide to the Buyers technical assistance and financial assistance by way of loans or may be agreed to from time to time." Yet, other than its seller financing of 87.5% of the station's purchase price, 8 / Childress has done nothing more of concern to us. A mere offer of financial assistance is insufficient to warrant a real-party-in-interest issue. *Sumitron Broadcasting Company, Inc.*, 15 FCC 2d 400, 405 (Rev. Bd. 1968). And, Triad has failed to allege any other facts suggesting that Childress will have more than a debtor-creditor relationship with Palmetto, a prerequisite to futher inquiry as to control. *See KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974).

21. In the end, we reject Triad's contention that the ALJ erred in accepting the November 30, 1989 amendment which substituted Palmetto for Childress in this proceeding. Section 73.3571(j)(3) of the rules reads as follows:

> An application for changes in the facilities of an existing station will continue to carry the same file number even though (pursuant to FCC approval) an assignment of license or transfer of control of said licensee or permittee has taken place if, upon consummation, the application is amended to reflect the new ownership.

Triad claims, however, that because Section 73.3571(j)(3) "is a predesignation processing rule," a good cause showing under Section 73.3522(b)(1) of the rules was required.

Not only is Triad's contention unsupported by precedent, but, as recognized by the ALJ and the Bureau, 9 / the plain meaning of Section 73.3571(j)(3) permitted the acceptance of the subject amendment because the underlying application was for a change in the facilities of WYDK(AM). Therefore, the Childress/Palmetto amendment was properly filed and accepted. The rule was correctly applied.

CONCLUSION

22. All decisional exceptions having been considered, the *I.D.* is affirmed without material modification. Triad has raised a great deal of sand, but the ALJ was not blinded to the imperatives of Section 307(b). Yadkinville should have its station.

23. ACCORDINGLY, IT IS ORDERED, That Triad's January 2, 1991 Motion to Leave to File Supplement to Exceptions and to Oral Argument IS GRANTED; the application of Triad Network, Inc. (File No. BP-870928AA) IS DENIED; and the application of Palmetto Communications Company (File No. BP-870331BK) for a construction permit to modify the facilities of Station WDIX(AM), Yadkinville, North Carolina IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] The *I.D.*, at paragraph 19, concludes that 1,398 of Yadkinville's 2,216 people (63%) would be served with the 27-watt operation. This figure is based, however, on a 1980 population count. In any event, it is clear that anything less than 80% coverage to a city of license by an AM station is *prima facie* inadequate in the absence of a rule waiver. *John R. Hughes and Eve H. Hughes*, 50 Fed. Reg. 5679 (1985). Moreover, the 27-watt nighttime service is classified as "secondary" and subject to interference at will by other stations. *See Unlimited-time Operation by Existing AM Daytime-Only Radio Broadcast Stations; Discontinuance of Authorization of Additional Daytime-Only Stations; Minimum Power of Class III Stations*, 2 FCC Rcd 7113 (1987).

[2] Thus, the *I.D.* did not consider the contingent comparative issue. In a footnote, though, the *I.D.* did note an earlier ruling rejecting Palmetto's integration claims and requiring Palmetto to bear Childress's diversification demerit, *see Memorandum Opinion and Order*, FCC 89M-2822, released December 22, 1989. In view of our resolution of this case on the 307(b) issue, it is unnecessary to address Palmetto's contingent exceptions.

[3] The Mass Media Bureau's reply to Triad's exceptions supports Palmetto arguments on the Section 307(b) issue.

[4] As iterated in *Land O'Lakes Broadcasting Corporation*, 4 FCC Rcd 344, 348 n.1 (1989), transmission service is the "provision of an opportunity for the development and expression of local interests, ideas, and talents and for the production of programs of special interest to a particular community . . . Every broadcast station is assigned to a community of license with a primary obligation to provide transmission service to that community."

[5] Although there is no record evidence on the point, Triad's counsel freely conceded this at oral argument. Tr. 187. Yadkinville is within the Greensboro/Winston-Salem/High Point Metropolitan Statistical Area. Palmetto Ex. 2, p.11. However, this fact is not determinative. *Faye & Richard Tuck, Inc., supra*, at 5379.

[6] The *I.D.* concluded that Yadkinville is not part of Greensboro. Triad maintains, however, that it contended only that Yadkinville is part of Winston-Salem. Nevertheless, Triad now contends that "Yadkinville is in close proximity to and dependent upon the metropolitan cities of Winston-Salem and Greensboro." Exceptions at 9. Given Triad's uncertain trumpet, we decline to dance.

[7] Triad's reliance on *Fenwick Island Broadcast Limited Partnership I*, 4 FCC Rcd 8803, 8804 (Rev. Bd. 1989), is faulty. That case simply required republication so as to advise the public of the identity of the new owner of the station. WYDK's proposed new ownership was clearly disclosed by the Childress newspaper publications.

[8] The sales price is $125,000: Palmetto paid $15,000 in cash, and Childress took a promissory note in the amount of $110,000 for 7 and a half years.

[9] *See* Mass Media Bureau's Comments on Petition for Leave to Amend, filed December 12, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-535

In the Matter of

Amendment of Section 73.202(b), RM-7520
Table of Allotments,
FM Broadcast Stations.
(Bowling Green, Kentucky)

ORDER GRANTING REQUEST FOR EXTENSION OF TIME TO FILE COMMENTS

Adopted: March 6, 1991; Released: March 7, 1991

By the Acting Chief, Allocations Branch:

1. On February 15, 1991, the Commission released a Public Notice in the captioned matter, accepting a counterproposal filed by Hardin County Broadcasting Company, Inc. The Public Notice set a deadline of March 6, 1991, for filing comments in response to the counterproposal. On March 4, 1991, Daily News Broadcasting Company ("Daily") filed a request that the period to file comments be extended for one week, to March 13, 1991.

2. In support of the requested extension, Daily states that the office of its engineering counsel, Silliman and Silliman, was devastated by a fire on February 23, 1991, at approximately 3:30 a.m. Documents relevant to this case were destroyed and are in the process of being replaced. Daily states that preliminary indications are that the firm's databases, although presently inaccessible, can be retrieved.

3. The Commission does not routinely grant extensions of time for filing comments in rule making proceedings.[1] In this case, we believe that additional time is justified. Good cause having been shown, we will extend the time for filing comments by one week.

4. Accordingly, IT IS ORDERED, That the Request for Extension of Time submitted by Daily News Broadcasting Company IS GRANTED to the extent that the date for filing comments in response to the Public Notice in this proceeding IS EXTENDED to March 13, 1991.

5. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, 1.45 and 1.46 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] *See* Section 1.46 of the Commission's Rules (47 C.F.R. § 1.46).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

FLEET CALL, INC. File No. LMK-90036

For Waiver and Other Relief
To Permit Creation of Enhanced
Specialized Mobile Radio Systems
in Six Markets

MEMORANDUM OPINION AND ORDER

Adopted: February 13, 1991; Released: March 14, 1991

By the Commission: Commissioner Quello issuing a separate statement.

INTRODUCTION

1. Fleet Call, Inc., and its subsidiaries (Fleet Call) have asked the Commission for waiver and other relief to permit creation of wide-area digital Specialized Mobile Radio (SMR) systems in six frequency congested markets: Chicago, Dallas, Houston, Los Angeles, New York, and San Francisco. We have before us this waiver request,[1] together with comments and reply comments filed in response to our Public Notice of April 12, 1990, soliciting comments on the Fleet Call proposal.[2] Review of this record convinces us of the general merits of Fleet Call's proposal. We conclude, however, that it is not necessary or appropriate to grant Fleet Call the full scope of the requested relief. Hence, we will provide Fleet Call with a waiver of the one-year construction period provided by 47 C.F.R. § 90.631(e).

BACKGROUND

2. We created Specialized Mobile Radio (SMR) as an open entry, competitive service, believing that this approach would stimulate the development and production of spectrally efficient trunking technology, [3] provide the flexibility necessary to meet existing and new user needs, and enhance the development of new techniques and services.[4] Over the years, we have affirmed our commitment to competition and flexibility and have encouraged SMR licensees to develop new, more efficient operations.[5] SMR licensees have responded to this challenge. Substitution of digital technology for the more common analog mode of operation and use of multiple base station configurations rather than the more traditional single transmitter site arrangement are but two recent examples of the innovation that has characterized the SMR industry to date.[6]

3. Under current rules, each SMR licensee is typically granted a minimum 70 mile separation between its primary site and the site of any co-channel licensee.[7] Satellite or secondary sites are permitted but are afforded no co-channel interference protection.[8] To be assigned more than one trunked system in a 40 mile area, an SMR licensee must first "load" its existing system to 70 mobiles per channel.[9] Thus, a five channel SMR system must be loaded to 350 mobiles before the licensee can obtain either a new system or additional channels in a market. Finally, SMR systems may provide both dispatch service and interconnection with the public switched telephone network for their customers. SMR licensees, however, cannot resell for profit the actual telephone service. Telephone service costs may be passed through to the end user, but without additional mark-up.[10]

4. Fleet Call is the licensee of more than one hundred fifty 800 MHz SMR channels in each of the markets involved in this proceeding.[11] Fleet Call also manages additional systems in each of these markets. Fleet Call represents that it currently provides dispatch, interconnect, and related services to more than 150,000 users.[12] It asserts, however, that the explosive growth of demand for SMR services in these markets is exhausting the capacity of its systems.[13] As a result, Fleet Call states, it has looked for innovative ways to use its available spectrum more efficiently to increase capacity and provide the full scope of private mobile radio communications services desired by today's diverse array of users. To this end, Fleet Call introduces in its waiver request what it calls Enhanced Specialized Mobile Radio (ESMR) service.

THE FLEET CALL PROPOSAL

5. Fleet Call states that its proposed service will provide high quality, innovative, and spectrally-efficient mobile communications services to the public. Fleet Call wishes first to convert its existing analog systems to digital transmission systems using Time Division Multiple Access (TDMA) multiplexing technology. According to Fleet Call, conversion to a digital TDMA system will allow a minimum of six digital channels from each existing 25 kHz wide 800 MHz analog voice channel.[14] Fleet Call will then combine all of its channels in each market into a multi-site, low-power base station configuration employing frequency reuse throughout the system.[15] The individual low-power base stations will be operated through a centralized switching facility providing seamless "hand-off" of communications on mobile units moving throughout the service area. Fleet Call claims, in this regard, that the combination of TDMA digital transmission technology and frequency reuse through multiple, low-power base station sites will achieve a fifteen-fold (or more) increase in the capacity of its systems over the capacity of existing analog trunked systems in each of the congested markets.[16]

6. Fleet Call states that its systems will offer greater capacity for the broad array of private land mobile radio services that SMRs are now permitted to offer. Fleet Call claims, for example, that it will be able to provide wide-area dispatch communications coverage throughout the congested markets.[17] This coverage will include, because of system design, automatic hand-off of calls as mobile units travel throughout the market area. Further, Fleet Call says that its advanced system will allow it to customize voice dispatch service, non-voice dispatch service, and mobile data communications. Fleet Call states that it will be able to offer location-specific sub-fleet or single mobile dispatch services in which a dispatcher dynamically identifies the specific mobile units closest to a desired location and calls only those units. This, according

to Fleet Call, reduces the number of radio links necessary for dispatch communications and minimizes the geographical area blocked by each transmission.[18]

7. Fleet Call also asserts that increased capacity will improve capacity to interconnect to the public switched telephone network.[19] Fleet Call states that the capacity that its proposed systems promise will allow it to provide interconnected service with blocking levels comparable to those of the public switched telephone network.[20] Fleet Call will not, however, resell interconnection service for profit. Finally, Fleet Call maintains that the digital nature of the proposed service will furnish police and fire departments, local governments, and other public-safety related communications entities a higher level of communications privacy than has been possible on traditional SMR systems.[21]

RELIEF REQUESTED

8. To establish and operate its systems, Fleet Call seeks relief in several areas. First, Fleet Call requests that we issue for each of its six markets a single system-wide license that will authorize construction and operation of multiple, low-power base stations, each one permitted to operate on any of the 800 MHz channels licensed to Fleet Call within that market.[22] Low-power base stations will be located at least 48 miles from any co-channel station, a distance that Fleet Call asserts will assure interference protection from these stations equivalent to the protection from traditional high-power SMR operations that the 70 mile requirement affords.[23] To allow periodic refinement and modification of its frequency reuse plan, Fleet Call asks that it be allowed to construct and operate additional low-power base stations with notice to the Commission but without prior Commission approval.

9. A central feature of Fleet Call's proposal is the ESMR Geographic Area (EGA), an area roughly defined by the composite 35-mile service areas of existing Fleet Call base stations that would basically serve as the systems' defined areas of operation.[24] Any totally or partially enclosed space would be included within the EGA, as co-channel separation distances would not normally permit co-channel licensing under present rules. A 35-mile "buffer zone" around the area created is also included in the Fleet Call proposal.[25] Within the EGA, Fleet Call requests authority to reuse all frequencies licensed to it at any established transmitter site, provided that it meets the co-channel protection requirements discussed above.[26] New co-channel systems would not be permitted in the EGA or buffer zone, however. Fleet Call considers this restriction essential to the stable RF environment that it needs to "fine tune" and refine its system to meet changing demand.[27] Other licensees could locate outside of the buffer zone and serve areas within the buffer zone so long as their base stations were at least 70 miles from an existing Fleet Call base station.[28]

10. To achieve the full benefits of its proposed service, Fleet Call seeks waiver of the 40 mile rule[29] to allow it to include in its system-wide license stations that it now manages but cannot acquire under strict interpretation of that provision. Given that aggregate loading of its existing SMR stations in each market meets Commission requirements of 70 mobiles per channel,[30] Fleet Call suggests that formal waiver may be unnecessary. Should the Commission conclude otherwise, however, Fleet Call asserts that its record as an actual provider of SMR service, coupled with its commitment to the development of ESMR, assures us that it will not hoard spectrum but will instead put all channels to immediate use. Finally, Fleet Call asks for waiver of our station identification rules so that it may transmit a single identifier for each system using digital modulation.[31]

DISCUSSION

11. The Communications Act directs us to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more efficient use of radio in the public interest."[32] Certainly, Fleet Call's proposal falls squarely within the spirit of our statutory mandate. We therefore seek to encourage the development of Fleet Call's networks within existing rules and policy where possible and with rule waiver where necessary and appropriate. Waiving Section 90.631(e) of our rules to allow Fleet Call to have more time to construct its systems is consistent with our grant of similar waivers to authorize extended construction periods for unique communications systems proposed by other entities.[33] The public interest, convenience, and necessity favor this regulatory approach and we adopt it here. We will not, however, grant much of the broad relief requested by Fleet Call and, further, will defer consideration of other requested relief pending the resolution of rule making proceedings.

12. Over 30 comments and 15 reply comments were filed in response to our Public Notice. One group of commenters, comprised principally of SMR licensees, applauds Fleet Call's proposal but seeks guarantees of protection and flexibility for other licensees in the markets involved. A second group of commenters, those representing the common carrier industry in particular, raises procedural objections to the proposal. This group argues that rule making, rather than waiver, is the appropriate administrative vehicle for this request and contends that Fleet Call's service will constitute common carriage. A third group of commenters questions the economic consequences of Fleet Call's proposal for individual SMR customers, raising such issues as the availability of alternative services and the possibility of equipment obsolescence. We consider each of these areas in turn.

13. *Technical Issues*: Our rules governing the SMR service establish technical and operational standards for the industry. They allow, by design, flexibility to foster and accommodate innovation. Hence, Fleet Call's proposal generally falls within the rules and policies governing the Specialized Mobile Radio Service. Indeed, our regulatory scheme itself provides much of the latitude that Fleet Call seeks.[34] At the same time, though, we acknowledge the need to preserve for existing licensees in Fleet Call's markets both the protection from interference guaranteed them by our rules and the flexibility they too require to operate competitively and effectively.[35] This necessity firmly guides our consideration of Fleet Call's proposal.[36]

14. Fleet Call seeks waiver of Section 90.621(b) of our rules to allow it to obtain a single station authorization for all of its channels in each market so that it may construct and operate multiple low-power base stations at any location within a defined service area; including locations that are closer to co-channel stations than the rules normally allow. Section 90.621(b) provides interference protection for each SMR base station by precluding the assignment of any co-channel facility located less than 70

miles from the primary base station.[37] The use of fixed mileage separations provides us with an administratively convenient method to assure a reasonably good quality of service and to promote spectrum efficiency through frequency reuse without having to perform a case-by-case engineering analysis. We have, however, entertained waiver requests of the minimum mileage separations from applicants that either obtain concurrence from affected co-channel licensees or that demonstrate through technical showings that short-spacing will not result in harmful interference because of the the terrain of an area or the technical features of a particular system.

15. We are currently analyzing our short-spacing waiver procedures in PR Docket No. 90-34.[38] In the *Further Notice of Proposed Rule Making* in that proceeding, we have proposed to amend the rules to permit separations less than the standard mileages without a waiver if the applicant can demonstrate through an appropriate technical showing that no harmful interference will result from short spacing.[39] If adopted, this proposal would obviate the need to give Fleet Call a system-wide waiver of Section 90.621(b). We will therefore defer consideration of these system-wide requests for waiver of Section 90.621(b) during the pendency of PR Docket No. 90-34.[40] If the proposed rule is not adopted, we will proceed to act on Fleet Call's waiver requests.

16. We note that Fleet Call has not filed specific applications seeking relief from the requirements of Section 90.621. Fleet Call instead seeks blanket authority to locate low-power stations anywhere within a defined service area so long as they maintain the 48 mile separation standard, and then merely to notify the Commission of the location of the stations. Fleet Call seeks this relief so that it may dynamically reconfigure its systems to respond quickly to changes in user demand, without burdening the Commission's limited processing resources.[41] The low-power stations would receive no co-channel protection *per se*. Rather, they would fall under the umbrella of protection currently provided Fleet Call's existing high-power sites. Fleet Call asks that we extend indefinitely this protection to its high-power stations, even when they are ultimately dismantled and replaced by the low-power network. Again, this would provide Fleet Call with its desired stable RF environment.

17. Basically, Fleet Call is seeking protection from new co-channel stations in its intended service areas. The markets in question, however, are among the most congested markets in the United States. Indeed, the fact that there are no 800 MHz SMR channels available in these markets is the very reason why Fleet Call wishes to reuse its own channels in a low-power multiple-transmitter configuration. It is our decision that providing Fleet Call blanket protection from new co-channel licensees is not necessary to the implementation of its proposal. Our analysis shows that the current operating environment in these markets already provides Fleet Call with much of the protection it requires from new applicants. That is, the co-channel protection that is afforded all SMR licensees in these areas, including Fleet Call, essentially precludes the assignment of new stations. We therefore see no reason to place a formal restriction against new co-channel applications in Fleet Call's intended service areas.[42]

18. Fleet Call also seeks relief from various administrative rules[43] so that it may construct and operate low-power base stations within its service areas without need for it to submit, or the Commission to approve, each new or modified facility. In lieu of filing individual applications, Fleet Call seeks to construct low-power base stations and then merely notify the Commission of the station's specifics. Fleet Call maintains that it requires this flexibility to experiment with system design and that its proposed notification procedure, which is permitted in the cellular service, would not be overly burdensome upon it or upon the Commission.

19. We fully recognize the technical difficulty that Fleet Call faces in reconstructing its existing systems from single high-power sites to multiple low-power sites. The public interest, convenience and necessity favor a regulatory approach that encourages such endeavors when they lead to the development and implementation of unique and spectrum efficient communications systems. It is, however, unnecessary to grant Fleet Call the specific relief that it requests. Fleet Call can, if it wishes, proceed to license its low-power sites individually, consistent with current application requirements. As is the case with any application for an SMR station received by the Commission, the sites applied for will receive co-channel protection from subsequently filed applications.

20. In addition, if Fleet Call requires additional flexibility to experiment with its system configuration, it can do so under Section 90.137 of our Rules, 47 C.F.R. § 90.137. This section allows licensees to operate multiple base stations at indeterminate locations throughout a defined geographical area. Under the authority contained in this section, Fleet Call may apply for authority to construct and test numerous base station sites throughout its proposed service areas without filing separate applications for each proposed or modified site.[44] No specific protection will be provided, however, to transmitters constructed under the authority contained in this section. Therefore, if Fleet Call believes that any new station will not fall under the umbrella of protection that it receives from its existing high-power stations, it may file an FCC Form 574 to license that station and normal SMR co-channel protection will then be afforded the station.[45]

21. We will, however, provide Fleet Call administrative relief in the following manner. Section 90.631 requires that trunked systems must be constructed within a one-year period. For the reasons discussed in paragraphs 25-27, *infra*, we will grant a waiver of this section and instead provide Fleet Call five years to construct any stations that would be part of its digital networks. As usual, the five year period will begin on the date of issue of any license associated with the networks. Regardless of the methods employed in the system design and implementation stage, each station placed into regular operation must ultimately be licensed individually.

22. Fleet Call's request for relief from Section 90.627, 47 C.F.R. § 90.627, the "40 mile rule," is not seriously challenged.[46] Indeed, relief from this rule is unnecessary. The 40 mile rule is designed to assure that spectrum is fully utilized and not hoarded.[47] As noted earlier,[48] the aggregate loading of Fleet Call's licensed and managed systems exceeds 70 mobiles per channel in each market. Fleet Call therefore substantially complies with the rule and has already earned the right to exclusive use of the channels within the six markets. Fleet Call is using its licensed channels fully and has satisfied us through its detailed proposal that it will continue to use these channels fully and efficiently. The objectives of Section 90.627 are clearly met under these circumstances. In similar circumstances, we have ruled that a multiple site arrange-

ment like that proposed here constitutes a single system for purposes of the 40 mile rule and, thus, the rule does not need to be waived.[40] Accordingly, we consider the requirements of Section 90.627 to have been met.

23. Fleet Call has also asked for waiver of Section 90.207, 47 C.F.R. § 90.207, so that it may use time division multiple access (TDMA) digital transmissions. Waiver of this rule is unnecessary. Section 90.645(f), 47 C.F.R. § 90.645(f), provides the necessary authority for Fleet Call to use TDMA. The provision takes precedence over the limitations of Section 90.207. *See* Section 90.601, 47 C.F.R. § 90.601. Concerning Fleet Call's request that we waive our station identification rules so that it may transmit the required station identification using digital transmissions on the systems' control channels we have decided to defer action until we address the issue by separate Rule Making order in the near future. Any change in the station identification rules would likely be made long before Fleet Call is ready to commence digital operations. If, however, we decide not to modify the station identification rules, we will proceed to act on its waiver request as on file or as amended or re-submitted.

24. *Procedural Challenges*: Some commenters argue that we may consider Fleet Call's request only in a notice and comment rule making rather than by waiver.[50] Several parties have argued, however, that Fleet Call has not established unique circumstances justifying the degree of waiver relief it has requested.[51] As a preliminary matter, we note that much of the objection to waiver relief would appear to be ameliorated by our decision to reject the more extensive waiver relief sought by Fleet Call, *i.e.*, the EGA concept with limitations on applications by others, the request that Fleet Call be permanently relieved from filing individual applications, and the broad restriction on entry of new applications in the six markets. In addition, some of the commenters' concerns regarding waiver relief appear to be tied to their misapprehension that Fleet Call will dispense with dispatch service, thereby fundamentally altering the nature of its SMR service.

25. In light of the limited nature of our relief and the teachings of *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), we believe it appropriate to proceed in this case through waiver rather than rule making. There, the court made clear that "[t]he agency discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." 418 F.2d at 1157. We are directed to consider seriously meritorious applications for waiver, and are reminded that a general rule, "deemed valid because its overall objectives are in the public interest, may not be in the 'public interest' if extended to an applicant who proposes a new service that will not undermine the policy served by the rule that has been adjudged in the public interest." *Id.* As we make clear in this *Order*, we believe this to be such a case with respect to the one-year construction rule.

26. Waivers of our Part 90 rules are appropriate where "unique circumstances are involved and . . . there is no reasonable alternative solution within existing rules." 47 C.F.R. § 90.151. *See also Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest); *National Cable Television Association, Inc. v. FCC*, 914 F.2d 285, 289 (D.C. Cir. 1990), *rehearing denied*, December 7, 1990 (in cable/telephone cross-ownership cases Commission must explain "why the advantages to be derived from [waiver] cannot be realized in the absence of waiver"). We believe that Fleet Call's innovative proposal to increase spectrum efficiency through use of multiple, low-power SMR facilities on an integrated basis in each of six major markets, while generally consistent with the SMR service, presents unique and special circumstances justifying waiver of the one-year construction rule. Because of the expense and technical complexity of developing integrated SMR systems, and the fact that most SMR spectrum is already licensed in major markets to a variety of licensees, it is unlikely that there will be many, if any, comparable proposals by others.[52] The novelty and complexity of Fleet Call's proposal make it virtually impossible for it to meet the one-year construction deadline. Moreover, because Fleet Call seeks only to reconfigure a fully loaded existing system, there is little, if any, risk of spectrum hoarding or failure to construct.[53] While we do not grant relief to the extent requested by Fleet Call, we believe that the benefits of Fleet Call's unique proposal cannot reasonably be accommodated in an expeditious fashion without the minimal waiver relief granted herein.[54] We have limited the requested waivers to the maximum extent feasible and our sole waiver has only extended its required period of construction. Given the substantial public interest benefits to be gained by SMR users from Fleet Call's spectrum efficient proposal, we conclude the public interest is better served by waiving our one-year construction rule and permitting the system to proceed expeditiously.

27. We also believe our approach here applies clear standards that will "prevent discriminatory application" of our waiver policy and "put future parties on notice as to its operation." *Northeast Cellular*, 897 F.2d at 1166. The waiver of our construction requirements follow existing waiver policies, which we intend to continue to apply in a similar fashion. *See, e.g., American Mobile Data Communications, Inc.*, 4 FCC Rcd at 3805 (one-year SMR construction rule waived where the proposal is "a novel one that will require experimentation and adjustment as it develops"); *Advanced Train Control System*, 3 FCC Rcd at 428 (eight-month non-SMR construction rule waived where the proposal is "extremely complex" and a "substantial undertaking"); *IBM Research and Development*, 53 RR 2d at 677 (eight-month non-SMR construction rule waived for "highly innovative" and "technically advanced system"); *Millicom Radio Telephone Co.*, Letter, No. 7320-12 at 2 (Land Mobile and Microwave Division, May 17, 1990) (one-year SMR construction rule waived in light of "complexity and innovation" of proposal).[55]

28. These challenges on procedural grounds also assume as a basic proposition that Fleet Call's SMR service will differ so substantially from traditional SMR service that rule making is the only appropriate avenue for its authorization. Commenters thus maintain that the SMR service was established to provide traditional dispatch service to small businesses and not to provide primarily interconnected communications service, as Fleet Call, they assert, intends. These commenters further contend that Fleet Call's concentration on interconnected service, combined with its multiple base station configuration, renders it a common carrier rather than a private carrier for regulatory purposes. As a final matter, commenters in this group maintain that a grant to Fleet Call will establish

new operating standards for the SMR industry. Changes of this magnitude must be examined in the broad context of rule making, they argue.

29. We reject this line of reasoning. The Commission's current rules and policies permit a multiple base station digital configuration for SMRs. Furthermore, the services that Fleet Call will provide in its enhanced networks are not functionally different from any service that it currently provides through its existing stations. Fleet Call states that it will provide traditional dispatch service, wide-area dispatch service, customized voice dispatch service, non-voice dispatch service, and mobile data communications.[56] Additionally, Fleet Call will be able to provide location specific sub-fleet or single mobile dispatch services, as well as interconnected telephone-type services. SMR systems are permitted, under current rules, to provide all of these services, including interconnection with the public switched telephone network. Through use of vastly improved technology, however, Fleet Call will be able to offer more of all permitted services in the spectrum available to it.

30. We note, with specific regard to the allegations regarding Fleet Call's proposed services, that Fleet Call does not propose to abandon dispatch service.[57] In fact, it has specifically stated its intention to continue providing dispatch service to fleet users, both large and small.[58] Fleet Call even states that it plans on using new digital technologies specifically designed for *dispatch-oriented* SMR systems.[59] Interconnection with the public switched telephone network is an accepted SMR service permitted by our rules[60] and is even discussed within the Communications Act.[61] Given that digital technology and multiple base station configurations are also permitted under current rules, we must conclude that Fleet Call's proposal does not create a *de facto* new service.

31. Commenters also argue that Section 332 will no longer apply to Fleet Call because the nature of its new service will be common carriage. They assert that the legislative history of Section 332 indicates that the test for whether an entity is a private land mobile carrier is a functional one and is meant to encompass entities which primarily provide dispatch services. With respect to the regulatory status of Fleet Call's SMR service, commenters' reliance upon service offerings and system configuration is misplaced. Section 3(gg) of the Communications Act, 47 U.S.C. § 3(gg), defines a private land mobile service as "a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation." Section 332(c)(1) and (2) of the Communications Act, 47 U.S.C. § 332(c)(1) and (2) further provides that the term, private land mobile service, includes SMR services, among others, "regardless of whether such service is provided indiscriminately to eligible users on a commercial basis," and that these services "shall not be deemed . . . common carrier[s] for any purpose under this Act." The primary test for inclusion in the private land mobile radio service, established by 47 U.S.C. § 332(c)(1), is that a licensee not resell interconnected telephone service for profit.[62] So long as a licensee continues to meet this requirement, and nothing in the record suggests that Fleet Call will not do so, it remains a private carrier for regulatory purposes. If it were to violate this principle, we would initiate enforcement actions for violations of the terms of the authorizations.[63] Common carriage is simply not permitted on the frequencies in question. *See American Teltronix*, 5 FCC Rcd 1955 (1990). Turning finally to the impact of Fleet Call's proposal on the SMR industry as a whole, our regulatory scheme for this service, as we have noted, emphasizes flexibility and innovation over conformity and standardization.

32. *Economic Consequences*: Some commenters express concern of economic harm to customers of Fleet Call and to other SMR operations.[64] Conversion to Fleet Call's digital system will render existing equipment obsolete, they argue, forcing Fleet Call customers either to purchase expensive new equipment or to find another SMR operator using their equipment. Such operators will be difficult to locate in these congested markets, however, commenters assert.[65] Moreover, they argue, Fleet Call's SMR service will undoubtedly be more expensive than traditional SMR service, leaving customers who cannot find substitutes for traditional service nowhere to go.[66] Commenters also maintain that conversion will disrupt service for current Fleet Call users, as channels are withdrawn from use for its new SMR system implementation.

33. We foresee no such dire consequences. First and foremost, Fleet Call's proposal is driven by the need to offer its end-users more capacity. We seriously doubt that Fleet Call would modify its existing stations if it believed that such an action would cost it its existing customer base. Certainly, Fleet Call has no logical incentive to jettison thousands of current system users. Nor would we expect it to risk its corporate image with a series of severed customer relationships. Furthermore, we note that it will take Fleet Call several years to complete construction of the low power systems. This will provide its end users that wish to convert to the digital service with additional time to amortize equipment costs.

34. Also, it is important to recognize that our rules for private carriers provide no protection for end user equipment investment. But, as one SMR licensee notes in its pleadings, the industry today employs several incompatible signalling formats. [67] SMR operators commonly convert from one format to another, with their customers either converting with them or migrating to other systems. Furthermore, mobile radios are improving so consistently that many customers prefer lease to purchase.[68] The SMR industry, in short, is a dynamic one, with change a constant feature. Fleet Call's SMR systems are, in this respect, consistent with industry practice, not alien to it. Finally, if any Fleet Call end-users do not wish to convert to the digital service, they will be able to migrate to other private land mobile systems in these markets.

35. Commenters' concerns about Fleet Call's SMR service fees and about the availability of other SMR service to those seeking it reflect an assumption that Fleet Call will stifle competition in its markets. We find no basis for this assumption. As for the conversion process itself, Fleet Call states that it can accommodate all existing users during the implementation period, moving them from system to system as required.[69] It has offered as well to assist customers not wishing its new SMR service to migrate to other SMR systems in the market.[70] We are satisfied that wholesale disruption is unlikely under these circumstances.

SUMMARY

36. Fleet Call proposes to build an ambitious private land mobile radio system that promises improved spectrum efficiency without requiring additional spectrum. Our task in reviewing this proposal is simplified by the fact that current rules already afford Fleet Call most of the latitude it requires to construct wide-area digital SMR systems. It is, therefore, unnecessary to grant Fleet Call the EGA concept proposed in its waiver request, with limitations on applications by others. Our rules, and the degree of protection currently afforded its existing stations, already provide Fleet Call with the protection necessary for it to proceed with its business plans. Further, it is unnecessary to waive Sections 1.911, 90.117, 90.119, and 90.135 of our rules because our current application procedures provide a workable framework under which Fleet Call can construct and license its systems. Similarly, because our rules permit time division multiple access digital transmissions, waiver of Section 90.207 is also unnecessary. Finally, because Fleet Call's channels are loaded with the requisite number of mobiles that it will serve on its systems, waiver of Section 90.627 is not required. Although it would be necessary under current rules to waive the mileage separation requirements of Section 90.621(b) and the station identification requirements of Sections 90.212 and 90.647, we defer action on these aspects of Fleet Call's proposal pending the outcome of future Rule Making proceedings. Accordingly, at this time, the only waiver relief we grant is the relief from the one-year construction requirement.

ORDERING CLAUSE

37. According, IT IS ORDERED, pursuant to Sections 1.3 and 90.151 of the Commission's Rules, that the request of Fleet Call, Inc., for Authority to Assign SMR Licenses and Waiver of Certain Private Radio Service Rules, IS GRANTED to the extent indicated herein, and IS DENIED OR DEFERRED in all other respects as indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Fleet Call's request was submitted initially on April 5, 1990. Fleet Call subsequently modified its request in comments filed on June 7, 1990.

[2] The comment period was twice extended. Comments were ultimately due on June 29, 1990, and replies on July 30, 1990. Orders, File No. LMK-90036, 5 FCC Rcd 3074 (1990); 5 FCC Rcd 3541 (1990).

[3] In a trunked system, two or more channels are linked by a computer that automatically assigns the first available channel to a user.

[4] *See* Second Report and Order, Docket No. 18262, 46 FCC 2d 752 (1974); Memorandum Opinion and Order, Docket No. 18262, 51 FCC 2d 945 (1975), *aff'd* National Association of Regulatory Utility Commissioners v. FCC, 525 F. 2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976).

[5] *See, e.g.*, Report and Order, PR Docket No. 86-404, 3 FCC Rcd 1838, 1848-49 (1988), *aff'd* 4 FCC Rcd 356 (1989).

[6] *See, e.g.*, American Mobile Data Communications, Inc., 4 FCC Rcd 3802 (1989).

[7] Section 90.621(b) of the Commission's Rules, 47 C.F.R. § 90.621(b). Special provision is made for certain locations in northern and southern California.

[8] Section 90.631(g) of the Commission's Rules, 47 C.F.R. § 90.631(g).

[9] Section 90.627 of the Commission's Rules, 47 C.F.R. § 90.627.

[10] 47 U.S.C. § 332(c)(1); *American Teltronix*, 5 FCC Rcd 1955 (1990); Memorandum Opinion and Order, Docket No. 20846, 93 FCC 2d 1111 (1983) *aff'd without opinion sub nom. Telocator* v. *FCC*, No. 83-1905, D.C. Cir., May 1, 1985.

[11] Waiver request of Fleet Call at 4.

[12] *Id.* at 5.

[13] *Id.* at 6-9.

[14] Comments of Fleet Call at 7.

[15] Waiver request at 26-28.

[16] *Id.* at 19. In its reply comments, Motorola, Inc., projects a twenty-four-fold capacity increase.

[17] *Id.* at 16.

[18] *Id.* at 21.

[19] *Id.* at 20.

[20] *Id.* at 21.

[21] *Id.* at 22.

[22] *Id.* at 24.

[23] *See* n.7, *supra*. In its comments at 9-11, Fleet Call proposes separation figures of 83 miles for the southern California systems specified in Section 90.621(b)(1) and 89 miles for the northern California locations specified in Section 90.621(b)(2).

[24] Waiver request of Fleet Call at 28-29 and Attachment C; comments of Fleet Call at 13-16.

[25] Comments of Fleet Call at 16.

[26] Fleet Call states that it will limit its frequency reuse to not more than 20 percent of the frequencies available to it in portions of the EGA that exceed a 100-mile radius from the geographic center of the city involved. Comments of Fleet Call at 16.

[27] Waiver request of Fleet Call at 32-34; comments of Fleet Call at 12.

[28] Comments of Fleet Call at 16.

[29] Section 90.627 of the Commission's Rules, 47 C.F.R. § 90.627. The 40 mile rule provides that a licensee will not be licensed for an additional trunked system within 40 miles of its existing trunked system unless the existing system is loaded to 70 mobiles per channel.

[30] Fleet Call provides the following aggregate loading figures: Chicago--70 mobiles per channel, Dallas--98 mobiles per channel, Houston--76 mobiles per channel, Los Angeles--102 mobiles per channel, New York--107 mobiles per channel, San Francisco--102 mobiles per channel. Waiver request at 41-42.

[31] Sections 90.212 and 90.647 of the Commission's Rules, 47 C.F.R. §§ 90.212, 90.647.

[32] 47 U.S.C. § 303(g).

[33] American Mobile Data Communications, Inc., note 6, *supra*; Advanced Train Control System, 3 FCC Rcd 427 (1988); IBM Research and Development, Inc., 53 RR 2d 675 (1983).

[34] Intelligent spectrum management requires that providers of land mobile radio service operate as efficiently as possible, and we have consistently encouraged both private and common carriers to develop new technologies to meet increasing demand. *See, e.g.*, First Report and Order and Second Notice of Inquiry, Docket No. 18262, 19 RR 2d 1663, 1665-66 (1970).

[35] Among commenters supporting Fleet Call's proposal on condition that other licensees in the markets retain their protection from prohibited interference and their flexibility to operate competitively are Advanced Mobilecomm, Inc., American SMR Network Association, Inc., Dispatch Communications, Inc., and National Association of Business and Educational Radio, Inc.

[36] In light of these guarantees, commenters' concerns that existing licenses may be modified in violation of Section 316 of the Communications Act of 1934, as amended, 47 U.S.C. § 316, are unfounded.

[37] In some areas of the country (*e.g.*, certain mountain peaks in the states of California and Washington), our rules require mileage separations greater than 70 miles. *See* 47 C.F.R. § 90.621(b)(1),(2), and (3).

[38] *See* Notice of Proposed Rule Making, PR Docket No. 90-34, 5 FCC Rcd 1135 (1990), *See also* Further Notice of Proposed Rule Making, FCC No. 91-40, adopted February 5, 1991, released February 20, 1991.

[39] *Id.*

[40] In the Notice of Proposed Rule Making in PR Docket No 90-34 we stated that we would continue to process requests for waiver of Section 90.621(b) based on technical showings. 5 FCC Rcd 1136 (1990). Because of the system-wide, complex, interrelated short-spaced waivers that Fleet Call would need, we believe it is appropriate to defer consideration of any such system-wide request. Consistent with existing policies for handling waivers during the pendency of the rule making, however, there may be a limited number of specific instances where consideration of a waiver request may be appropriate. *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). Those waiver requests that are held in abeyance will receive first-in status from any subsequently filed applications in the same area and then will be processed sequentially in accordance with Section 90.611(b) of the Rules, 47 C.F.R. § 90.611(b).

[41] Waiver request at 30 - 32.

[42] There are locations in the Dallas and Houston markets, particularly on the outskirts of the cities, where it may be possible to engineer-in new SMR facilities that could affect Fleet Call's system design. We will pay particular attention to any applications in this category, so as to avoid "strike" proposals that appear to be filed principally to thwart Fleet Call's activities. We will also attempt, to the extent feasible, to license other available frequencies to satisfy the needs of *bona fide* applicants.

[43] These rules include Sections 1.911, 90.117, 90.119, and 90.135 of the Commission's Rules, 47 C.F.R. §§ 1.911, 90.117, 90.119, and 90.135.

[44] If Fleet Call or any licensee intends to construct or alter an antenna structure and the construction or alteration would require notice to the FAA under Section 17.7 of the Rules (47 C.F.R. § 17.7), then, prior to construction or alteration, the licensee must (1) file a Notice of Proposed Construction or Alteration (FAA Form 7460-1) with the FAA and obtain a determination, (2) obtain painting and lighting requirements from the FCC. To obtain painting and lighting requirements from the FCC, the licensee must forward a request along with a copy of the FAA determination to:

Federal Communications Commission

Chief, Antenna Survey Branch

Public Service Division, FOB

Washington, D.C. 20554.

[45] This means that Fleet Call will be required to apply for specific channels at specific base station locations.

[46] In fact, several commenters question only the limited scope of Fleet Call's request, arguing that relief should be afforded all comparable licensees. *See, e.g.*, comments of Commercial Engineering Corporation at 4-5, comments of Millicom Radio Telephone Company at 2-3.

[47] *See* 4 FCC Rcd at 8676.

[48] *See* note 30, *supra*.

[49] *See, e.g.*, American Mobile Data Communications, Inc., 4 FCC Rcd at 3806.

[50] Representative of those raising such challenges are BellSouth Corporation, Cellular Telecommunications Industry Association, McCaw Cellular Communications, Inc., and Telephone and Data Systems, Inc.

[51] *See, e.g.*, comments of Cellular Telecommunications Industry Association at 13-34.

[52] Reply comments of Fleet Call at 21.

[53] Waiver request of Fleet Call at 46.

[54] *Id.* at 40.

[55] The waivers of the one-year SMR construction rule in *American Mobile* and *Millicom* provided for a three-year construction period. Here, because of the use of low-powered facilities, the number of transmitter sites to be constructed in each market is substantially greater, so it is within reason to provide a somewhat longer construction period. Moreover, Fleet Call's proposal involves re-configuring existing systems and Fleet Call needs to move somewhat more cautiously than did American Mobile and Millicom to prevent disruption of service to existing users. Finally, because Fleet Call's proposal involves existing, rather than new, spectrum, the process of engineering its systems to protect other co-channel licensees requires more time than in *American Mobile* and *Millicom*.

[56] Waiver request at 21.

[57] Commenters who argue that Fleet Call will only provide interconnected telephone-type services assume that (1) existing dispatch customers will not pay for more expensive digital services, (2) Fleet Call will have to provide mainly interconnected service to recover the costs of its new system, and (3) the proposed system will produce no efficiencies from frequency re-use when dispatch service is provided. All of these assertions are speculative.

[58] *See, e.g.*, reply comments of Fleet Call at 18-19.

[59] *See* comments of Fleet Call at 3.

[60] Section 90.477(b)(1) of the Commission's Rules, 47 C.F.R. § 90.477(b)(1).

[61] 47 U.S.C. § 332(c)(1).

[62] *See* note 10, *supra*.

[63] We note that Section 90.477(b) of the Rules, 47 C.F.R. § 90.477(b), requires licensees of multiple-licensed 800 MHz land mobile systems to maintain cost distribution records relating to interconnect service and to make these records available to the

Commission upon request. We encourage Fleet Call to maintain accurate records and to be prepared to surrender these records upon request to the Commission for inspection.

[64] The comments and reply comments of Lonnie R. Danchik are typical of this group.

[65] *See, e.g.*, comments of Ron Smith, President, Communications & Emergency Products, Inc.

[66] *See, e.g.*, comments of Lonnie R. Danchik at 3.

[67] Reply comments of American Mobile Systems, Inc., at 6-7.

[68] *Id.*

[69] Reply comments of Fleet Call at 43.

[70] Waiver request of Fleet Call at 46.

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO

In Re: Request of Fleet Call, Inc., for Waiver and Other Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets

I have followed closely Fleet Call's request for waivers and the comments filed in response. I believe the technological concept of digital cellular specialized mobile radio services will move private land mobile services technology into the next century. This advanced technology will use spectrum efficiently and help ease congestion especially in large urban areas.

Some parties questioned the Commission's use of waivers rather than rule making to address issues raised by Fleet Call. I, too, want to be assured that the Commission acts in a procedurally correct fashion. I am concerned, however, that our procedures not be abused by those seeking to stifle possible competition. Our procedures should not be used as a delaying tactic. I encourage the Private Radio Bureau to address Fleet Call's request in an expeditious and procedurally correct manner. I believe this is particularly important in markets where spectrum and its use is at a premium.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter

Ameritech Operating Companies — Transmittal Nos. 425, 467

Petition for Waiver of Section 69.4(b) of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: March 5, 1991; Released: March 5, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On Febuary 6, 1990, the Ameritech Operating Companies (Ameritech) filed a petition for waiver of Section 69.4(b) of the Commission's Rules, which describes the access service elements established by the Commission, 47 C.F.R. § 69.4(b), in order to establish separate rate elements for operator services to its interexchange carrier (IC) access customers.[1] Ameritech also seeks a waiver of Part 69 cost allocation requirements to allocate costs associated with operator call processing to the Information rate element.

2. Concurrent with its waiver petition, Ameritech filed Transmittal Nos. 425 and 467 which would implement the requested new rate elements for operator transfer and line status services.

3. In this Order we grant Ameritech's request to establish separate access rate elements for provision of two operator services. We deny Ameritech's request to include these costs or revenues in the Information element. This Order also establishes a blanket waiver for all carriers who provide or wish to provide the operator services of line status and operator transfer. This waiver requires the creation of separate operator services access elements and requires that the costs associated with those services be allocated to those same elements.

II. WAIVER REQUEST; PLEADINGS AND DISCUSSION

A. Petition

4. Of these two services, only OTS has been opposed in the comments; therefore, this service is the focus of our discussion. Ameritech plans to transfer O-interLATA, interexchange traffic to any interexchange carrier (IC) who has subscribed to OTS.[2] In most of its region, Ameritech currently practices "hard turnback," which means that no O-interLATA, interexchange calls are transferred to an IC operator. Ameritech refuses to transfer such calls and requires end users instead to dial "OO-," "O+" or "1+" to place an interexchange call. [3]

5. If OTS is implemented, Ameritech would transfer O-calls to the end user's preferred IC rather than requiring the caller to dial an IC operator, as long as that IC is a subscriber of OTS.[4] If the end user's preferred IC is not an OTS subscriber, Ameritech's operator will advise the end user to contact that carrier for assistance. If the end user does not have a particular preference for which IC receives the call, Ameritech's operator will read a list of IC subscribers from which the end user can select one. Ameritech Waiver Petition at 3. This list will be changed monthly so that the first IC subscriber on the list each month will be placed at the bottom of the list for the next month, and so on. *Id.* at 3 n.4. Once an IC has been selected by the end user, Ameritech will transfer the call to the selected IC's point of presence (POP) in the end user's originating LATA. *Id.* at 4.

6. Five parties responded to the Public Notice seeking comments on Ameritech's petition.[5] The comments on the waiver petition mirror those in the Southwestern Bell operator transfer proceeding.[6] Accordingly, this Order includes only a brief summary of those issues.

B. Effect of Service on Competition

1. Pleadings

7. Most of the parties opposing Ameritech's request argue that granting the waiver would diminish competition. The premise of this argument is that Ameritech's plan would require an IC to have substantial facilities to subscribe to OTS, and that only AT&T has the traffic volume and capital to make participation cost effective. Comptel Opposition at 3; ITI Opposition at 13; OSPA Opposition at 11. Comptel and OSPA are also concerned that operator transfer service will lessen competition in the intraLATA market since O-calls will default to Ameritech, even though there are other intraLATA carriers in several jurisdictions in the Ameritech region. Comptel Opposition at 3-4; OSPA Opposition at 10.

8. Several parties also claim that Ameritech's plan violates the United States District Court ruling on payphone presubscription[7] under the Modification of Final Judgment (MFJ).[8] Capital Opposition at 3-4; ITI Opposition at 8; OSPA Opposition at 6-7. These parties argue that the Ameritech OTS plan would circumvent payphone presubscription by routing O-calls in a manner that ignores the "customer's" choice of an IC. Capital Opposition at 4; OSPA Opposition at 6-8. ITI also argues that Ameritech's OTS plan would violate the MFJ prohibition on LECs providing information services. ITI Opposition at 10.

9. The parties opposing the Ameritech waiver request uniformly argue that the establishment of OTS should be considered by the Commission in a Rule Making proceeding, and not in a series of waiver requests. Capital Opposition at 3; Comptel Opposition at 4; ITI Opposition at 13-14; OSPA Opposition at 14-15. The main concern is that there should be uniformity in how LECs handle O-calls; otherwise, they allege there will continue to be public confusion regarding these services. Capital Opposition at 3; Comptel Opposition at 4; ITI Opposition at 13-14; OSPA Opposition at 14-15.

10. Ameritech responds that, contrary to these assertions, OTS will not promote AT&T but will advance competition. Ameritech Waiver Reply at 4. First, Ameritech argues that operators will only use the OTS procedures as a last resort, after informing the caller that

the interLATA call can be completed by using O+ or 1+. *Id.* at 5. Second, Ameritech contends that OTS will actually increase competition by giving callers a choice of ICs, rather than forcing them to use the presubscribed carrier.[9] *Id.* at 6. Regarding the MFJ, Ameritech claims that the other parties' arguments misrepresent the district court decision on payphones.[10] According to Ameritech, the court was trying to increase competition and favored allowing the billed party to choose the IC, but required payphone presubscription since billed party preference is not technically feasible. *Id.* at 8.

2. Discussion

11. These arguments are similar to arguments that we considered in the order granting Southwestern Bell's Part 69 waiver for O- transfer services. That Order noted that the " *Access Charge Decision* does not suggest that the Commission established access elements in order to subject future access services to pre-screening in order to determine whether a particular offering would be desirable." 5 FCC Rcd at 3454. We also concluded that "O-transfer services appear to be benificial to consumers." *Ibid.* The comments in this proceeding have not presented any compelling reason to reach a different conclusion. We are not persuaded by claims that the existence of a O-transfer service will confer an undue competitive advantage upon AT&T. Callers who prefer another carrier will not be transferred to AT&T.

C. Legal Sufficiency of Waiver Request

1. Pleadings

12. Capital and ITI contend that Ameritech has not met the requirements for the grant of a waiver. They argue that Ameritech has not shown any special circumstances. Capital Opposition at 5; ITI Opposition at 6. Both claim that the only demonstration of public harm made by Ameritech is customer dissatisfaction with how Ameritech operators currently handle O-calls, and that this is only supported by a simple survey. Capital Opposition at 5; ITI Opposition at 7.

13. Ameritech replies that it has met the standards for the grant of a waiver. Ameritech argues that the public interest would be served by the establishment of a reasonable relationship between the cost of transferring O-interLATA calls to the interexchange carrier of the consumer's choice and the method of recovering those costs. Ameritech Waiver Reply at 3. Second, states Ameritech, grant of the waiver would not undermine the policies supporting Part 69 of the Commission's Rules. *Id.* Finally, Ameritech claims that the grant of its waiver would be consistent with the grant of similar requests by other LECs. *Id.* at 4.

2. Discussion

14. We believe that Ameritech has met its burden of showing good cause for grant of its waiver request, and that a Part 69 waiver in this instance is consistent with the public interest. For one thing, Ameritech's customers are apparently frustrated by its "hard turnback" procedures. For another, OTS would increase end users' options for selecting an IC. Finally, the Bureau has already determined, in four other cases, that a Part 69 waiver for the provision of O-transfer is in the public interest.[11]

D. Cost Issues

1. Pleadings

15. Only ITI addressed the issue of allocating OTS costs to the Information element of Part 69, and its comments are limited to the propriety of making such a rule change in a waiver proceeding. ITI Opposition at 4-5. Southwestern supports the reallocation to the Information element, arguing that given the changes in operator services provided by the LECs, an expansion of the Information element is necessary at this time.[12] Southwestern Comments at 2-3. Ameritech replies that allocating the cost of OTS to the Information element is consistent with the rules which allocate directory assistance costs to the Information rate element. Ameritech Waiver Reply at 3.[13]

2. Discussion

16. Sections 69.306(b) and 69.404 of the Rules, 47 C.F.R. §§ 69.306(b), 69.404, require that costs associated with operator services, other than directory assistance, be allocated to the Interexchange category of Part 69. Ameritech seeks a waiver of these rules in order to allocate the costs of operator transfer and line status services to the Information rate element of Part 69 instead. The Bureau previously rejected identical proposals by Southwestern Bell and Illinois Consolidated because the rules for the information element were designed for the provision of directory assistance, *i.e.*, an operator giving a telephone number to a caller. The operator services described in this waiver request perform a different function.

17. Allocation of the costs associated with these access services to the Interexchange category would produce imbalanced results. Accordingly, we grant Ameritech a waiver to establish separate rate elements for these services, but require that Ameritech's costs for operator services be allocated to these same access elements.

18. Furthermore, this Order grants a waiver of Part 69 to all local exchange carriers who provide or seek to provide the same operator services as long as two conditions are met.[14] First, local exchange carriers must create separate Part 69 operator service access elements for an operator transfer or a line status service. Second, all costs associated with provision of those services must be allocated to those operator service access elements rather than to the Interexchange category. We believe that such a blanket Part 69 waiver serves the public interest by preventing the Bureau from having to expend considerable resources continually revisiting issues already examined in prior and nearly identical operator services waiver petitions.[15] The Bureau will, of course, continue to examine the details of an individual local exchange carrier's operator services offering upon its filing of its tariff transmittal.[16]

III. TARIFF TRANSMITTALS

A. Tariff Offering

19. On February 6, 1990, Ameritech filed Transmittal 425 to implement the rate element for OTS requested in its waiver petition. Ameritech would charge a flat rate of $0.22 for each call that is transferred to and received by an OTS customer. Transmittal 425, Tariff F.C.C. No. 2, 1st Revised Page 213.1, Section 6.8.1 (D)(3). On August

14, 1990, Ameritech filed Transmittal 467 which revised the definitions of a "completed call" and an "operator service area" and provided additional explanation for its cost support. Transmittal 467, Tariff F.C.C. No. 2, 2nd Revised Page 200, Section 6.7.7.D.

20. There are eight possible operator systems within Ameritech's region to which an access customer may subscribe. In order to participate in any one of these systems, a customer must have Feature Group D trunks between its premises and each operator system location as well as a point of presence (POP) in each LATA served by that system and trunks between that POP and the operator services switch that serves the LATA. Ameritech Tr. 425, Description and Justification (D&J) at 3.

B. Pleadings

21. Two petitioners protested Transmittal 425, and one protested Transmittal 467.[17]

1. Rate Formation

22. ITI contends that a per call rate of $0.22 in each of Ameritech's regions will produce subsidies for Ameritech. For example, states ITI, in Indiana Ameritech's cost support indicates that the cost of OTS is $0.27, but subscribers will only pay $0.22. In Michigan, however, it notes that while the cost of OTS is $0.20, subscribers must pay $0.22. This arrangement, according to ITI, means that subscribers in Michigan will subsidize subscribers in Indiana. ITI Tr. 425 Petition at 12-13. Furthermore, ITI contends that Ameritech's costs are unreasonable because the costs of this service have been assigned on a residual basis.[18] According to ITI, this costing method is inconsistent with Commission policy. *Id.* at 12-14.

23. Ameritech denies having used a residual costing method to calculate its revenue requirement. Ameritech Tr. 425 Reply at 5, 7. It asserts that its revenue requirement was calculated on the basis of direct cost allocations in conformance with the Commission's policy. *Id.* at 6.

2. Subscriber Terms and Conditions

24. OSPA and CompTel contend that Ameritech's involvement in the selection of an IC is as unlawful as a BOC's involvement with shared tenant services, a practice which the MFJ Court has declared unlawful. Joint Petition at 4. These parties contend that the presubscription process is eliminated by Ameritech's plan to read a list of IC OTS subscribers. *Id.* at 6. Thus, OSPA and CompTel conclude that the tariff is patently unlawful because it offers a service that Ameritech cannot provide. *Id.*

25. ITI contends that OTS is unlawful because access to an end user's preferred carrier is denied unless that carrier is a subscriber to OTS. ITI Transmittal No. 425, Petition at 14-15. ITI equates this practice to call blocking because it bars consumers from reaching their preferred carrier and impedes full operator services competition. *Id.* at 14-15, citing *TRAC v. ITI*, Memorandum Opinion and Order, 4 FCC Rcd 3950 (Com.Car.Bur. 1989).

26. ITI observes that under Transmittal 425, the OTS charge will be incurred upon activation of the switch to transfer the call regardless of whether the call is completed. *Id.* at 15. ITI contends that such a practice is unreasonable. Additionally, ITI contends that Ameritech's requirement that an OTS subscriber have a POP in every LATA served by an Operator Service System is unlawful. ITI notes that an IC may not have a POP in each LATA served by a particular Operator Service System. Furthermore, according to ITI, Ameritech's requirement that an OTS subscriber have multiple trunks to make connections with every switch in the LATA is unreasonable. ITI suggests that tandem switches be provided to enable access to multiple switch locations. *Id.* at 16. Overall, ITI considers these system requirements to be onerous. *Id.*

27. In Transmittal 467, Ameritech modified its tariff language so that the transfer charge is assessed once the call has been "received by" the IC customer rather than upon activation of the transfer switch. *See* Tariff F.C.C. No. 2, Tr. 467, 2nd Revised Page 200, Section 6.7.7(D).

3. Sufficiency of Cost Support

28. ITI argues generally that Ameritech's cost support does not comply with the Commission's Section 61.38 requirements. Comptel and ITI argue that the demand calculation for OTS is inadequate. For example, they contend that the demand for OTS in Wisconsin is not based on any actual data, just on projections. Comptel Petition at 12; ITI Tr. 425 Petition at 11. ITI also suggests that Ameritech's cost support is doubtful because it was not based on a completed study. ITI Tr. 425 Petition at 9-11, and 13.

29. Ameritech replies that as a result of its "hard turnback" policy, there is little historical data upon which to base its demand and revenue requirement calculations. Ameritech Tr. 425 Reply at 4 n.4. Therefore, Ameritech states, the three months of data it accumulated immediately after taking back operator services from AT&T prior to implementing its hard turnback policy is the most accurate indication it has for likely OTS demand. *Id.* at 5 n.5. Ameritech adds that no actual data are available from Wisconsin Bell because the hard turnback policy was implemented in that area immediately after it took back operator services. *Id.* at 5.

30. The Bureau has reviewed Ameritech's Transmittal Nos. 425, 467, the petitioners' assertions, and related pleadings. We conclude that no compelling argument has been presented that the tariff as revised is so patently unlawful as to require rejection, and that an investigation is not warranted at this time.

IV. ORDERING CLAUSES

31. Accordingly, IT IS ORDERED that the petition for waiver filed by the Ameritech Operating Companies IS GRANTED, to the extent provided herein.

32. IT IS FURTHER ORDERED that the petitions filed against the Ameritech Operating Companies, Tariff F.C.C. No.2, Transmittal Nos. 425, 467 by International Telecharge, Inc. and Capital Network System Inc. ARE DENIED.

33. IT IS FURTHER ORDERED that a blanket Part 69 waiver IS GRANTED to all local exchange carriers who provide or seek to provide line status and operator transfer services, as specified in paragraph 18 above.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Ameritech Petition for Waiver, filed Feb. 6, 1990 and Ameritech Tariff F.C.C. No. 2, Transmittal Nos. 425, 467 filed Feb. 6, 1990.

[2] A "O-" call is one made by merely dialing O, and not O plus ("O+") a telephone number. If "OO-" is dialed, the caller will reach the IC operator prssubscribed to that line. With a O+ call, the caller dials the entire telephone number and then passes along billing information to either an operator of the IC presubscribed to that line or a recording provided by the IC which prompts billing information.

[3] Ameritech indicates that it has received hostile comments from end users about its "hard turnback" policy. Ameritech estimates that over a quarter of a million customers will be affected next year if its turnback policy is continued. Ameritech Waiver Petition at 5 n.5.

[4] Ameritech states that prior to transferring a O-call, end users will be instructed to dial the call themselves. OTS will be used if the end user "insists" that Ameritech make the transfer. Ameritech Waiver Petition at 3 n.3.

[5] Public Notice, The Ameritech Operating Companies File Petition for Waiver of Part 69 To Establish Operator Transfer Service, 5 FCC Rcd 3456 (Com.Car.Bur. 1990). Comments in opposition to Ameritech's waiver petition were filed on April 9, 1990, by the Operator Service Providers of America (OSPA Opposition); the Competitive Telecommunications Association (CompTel Opposition); Capital Network System, Inc. (Capital Opposition), and International Telecharge, Inc. (ITI Opposition). Southwestern Bell Telephone Company filed comments in support of Ameritech's petition on that same day (Southwestern Comments). Ameritech replied to the oppositions on April 23, 1990 (Ameritech Wavier Reply).

[6] *See* Southwestern Bell Petition for Waiver, Order, 5 FCC Rcd 3452 (Com. Car.Bur. 1990).

[7] United States v. Western Elec. Co., 698 F.Supp. 348 (D.D.C. 1988).

[8] United States v. American Tel. & Tel., 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[9] Ameritech also states that it does not have the technical capabilities to determine the identity of the presubscribed carrier on O- calls. Ameritech Waiver Reply at 6.

[10] U.S. v. Western Elec. Co., *supra*.

[11] Rules may be waived if there is "good cause" to do so. *See* Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. WAIT Radio-v FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969). *See also* Northwest Cellular Telephone Company, L.P. v. FCC, 879 F.2d 1164 (1990).

[12] ITI filed brief reply comments which argue that Southwestern's comments did not add anything to the record and that Southwestern's conclusion was unsupported. ITI Reply Comments at 1.

[13] Ameritech requests that the costs associated with OTS be allocated to the Information rate element because the incurred costs of the transfer directly benefit those who provide interstate interLATA service. Ameritech Description and Justification at 5.

[14] The Bureau has before it a petition filed by United Telephone System Companies (United) on August 20, 1990 requesting a limited waiver of Part 69 Rules to permit United to establish access rate elements and to reallocate the associated costs and investment for operator transfer and line status services. The waiver petition is uncontested. United is entitled to come under the blanket waiver granted herein, provided that United's operator services meet the conditions stated in this paragraph.

[15] The Bureau anticipates that operator transfer service may be offered by some local exchange carriers whose end offices are not yet converted to equal access and, thus, can only transfer calls to AT&T. We encourage such carriers, upon conversion of these offices, to offer this service to other ICs in order to enhance competition in this arena.

[16] This blanket waiver also waives any inconsistent requirement in any prior Part 69 waivers relating to these operator services (line status and operator transfer services).

[17] On June 19, 1990, petitions to reject or, in the alternative, suspend and investigate Transmittal 425 were filed by International Telecharge Inc. (ITI Tr. 425 Petition) and jointly by the Operator Service Providers of America and the Competitive Telecommunications Association (Joint Petition). Ameritech replied to these petitions on June 26, 1990 (Ameritech Tr. 425 Reply). On August 21, 1990, a petition to reject or, in the alternative, suspend and investigate Transmittal 467 was filed by International Telecharge Inc. (ITI Tr. 467 Petition). Ameritech replied to that petition on August 30, 1990 (Ameritech Tr. 467 Reply).

[18] When a carrier engages in residual costing it directly assigns certain costs to one service and merely allocates all other remaining costs to a second service. This costing method may be arbitrary because it loads costs onto a service that may not have a direct relationship to it. Thus, ITI implies that the rates of Ameritech's OTS do not represent the true costs of the service but rather the residual costs of other services.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 14, 1991

PACIFIC MUTUAL INSURANCE COMPANY ASKS FCC TO DECLARE CERTAIN TARIFF PROVISIONS UNLAWFUL AND ESTABLISH POLICIES TO ALLEVIATE THE TOLL FRAUD BURDEN ON USERS

Pacific Mutual Insurance Company (Pacific), a national insurance company located in Newport Beach, California, has petitioned the Commission to take action regarding toll fraud. Pacific states that it has incurred substantial liability on account of fraudulent interstate, interexchange telephone calls made through remote access to its on-premises PBX. Pacific has petitioned the Commission, first, to declare that the tariff provisions under which AT&T has held it liable for payment of toll fraud charges are ambiguous and, consequently, unlawful. Additionally, Pacific has asked the Commission to establish policies, rules and tariff provisions which would allocate the costs of remote-access toll fraud over all users, carriers and suppliers, and also promote the development and deployment of effective anti-fraud measures.

Interested parties may file comments concerning the Pacific petition within 30 days of the release of this Public Notice. Reply comments should be filed within 15 days thereafter. All filings should refer to File No. ENF-91-07.

Copies of the petition and any subsequently filed documents in this matter may be obtained from Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. The petition and any other documents will also be available for review and copying in Room 6206, 2025 M Street, N.W., Washington, D.C. 20554.

For further information, contact Frank Patella at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-281

In the Matter of

Amendment of Section 73.606(b), RM-7322
Table of Allotments,
TV Broadcast Stations.
(Jasper and Tuscaloosa, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 7, 1991; Released: March 15, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 5 FCC Rcd 3429 (1990), issued in response to a petition filed on behalf of Channel 17 Associates, Ltd. (petitioner), licensee of television Station WDBB(TV), proposing to change its community of license from Tuscaloosa to Jasper, Alabama, and to modify the license of Station WDBB(TV) accordingly, pursuant to the provisions of Section 1.420(i) of the Commission's Rules. Petitioner filed comments in response to the *Notice*. Comments were also filed by Birmingham Television Corporation ("BTC"), licensee of Station WBMG(TV), Channel 42, Birmingham, Alabama, and by HR Broadcasting of Birmingham, Inc. ("HRB"). Petitioner and BTC filed reply comments.[1]

2. After the close of the pleading cycle, petitioner filed a request to withdraw its proposal to change the community of license of Station WDBB(TV) from Tuscaloosa to Jasper, Alabama, stating it is no longer interested in pursuing the proposal.[2] Therefore, and in accordance with Commission policy, we will grant petitioner's request for dismissal of its rule making proposal. *See Grundy Center, Iowa*, 4 FCC Rcd 1275 (1989). In light of our decision, we need not discuss the opposing comments filed in this proceeding.

3. Accordingly, IT IS ORDERED, That the petition for rule making filed on behalf of Channel 17 Associates, Ltd. (RM-7322) seeking the reallotment of UHF television Channel 17 from Tuscaloosa to Jasper, Alabama, IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner opposed the acceptance of HRB's comments, as violative of Section 1.420(c) of the Commission's Rules. Petitioner's opposition is moot in light of the resolution of this proceeding.

[2] Pursuant to Commission Rule 1.420(j), petitioner's withdrawal request contained an affidavit stating that it had received no consideration for the withdrawal.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-579

In the Matter of

Amendment of Section 73.202(b), RM-7330
Table of Allotments,
FM Broadcast Stations.
(Pasco, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 7, 1991; Released: March 15, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 7152 (1990), issued in response to a petition filed by Thomas W. Read, d/b/a West Pasco Fine Arts Radio ("petitioner"), proposing the substitution of FM Channel 267C3 for Channel 267A at Pasco, Washington, and the modification of its construction permit for Station KGDN(FM) (formerly Station KUKE), Channel 267A, at Pasco to specify operation on the higher powered channel. Petitioner filed comments in support of the proposal restating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 267C3 for Channel 267A at Pasco, Washington, since it could provide the community with a wide coverage area FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 the Commission's Rules with a site restriction of 7.3 kilometers (4.5 miles) west of of the community to avoid a short-spacing to the construction permit of Station KACA(FM), Channel 269C3, Prosser, Washington.[1] Concurrence of the Canadian government has been obtained, since Pasco is located within 320 kilometers (200 miles) of the U.S.-Canadian border. In accordance with Section 1.420(g) of the Commission's Rules, we will also modify petitioner's construction permit for Station KGDN(FM) at Pasco to specify operation on Channel 267C3.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 29, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Pasco, Washington	252A, 267C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit for Thomas W. Read, d/b/a West Pasco Fine Arts Radio, for Station KGDN(FM), Pasco, Washington, IS MODIFIED to specify operation on Channel 267C3, in lieu of Channel 267A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 267C3 at Pasco are North Latitude 46-13-16 and West Longitude 119-11-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-57

In the Matter of

Amendment of Section 73.202(b), RM-7601
Table of Allotments,
FM Broadcast Stations.
(New Iberia and Ville Platte,
Louisiana)

NOTICE OF PROPOSED RULE MAKING
AND
ORDER TO SHOW CAUSE

Adopted: March 7, 1991; Released: March 15, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by D.C. Jones ("petitioner"), permittee of Channel 229C2 at New Iberia, Louisiana, requesting the substitution of Channel 229C1 for Channel 229C2 at New Iberia and modification of her construction permit to specify operation on the higher powered channel. To accommodate the allotment of Channel 229C1 to New Iberia, petitioner also requests the substitution of Channel 223A for Channel 228A at Ville Platte, Louisiana, and the modification of Station KVPI(FM)'s license accordingly. Petitioner states that she will apply for Channel 229C1 and also will reimburse the licensee of Station KVPI(FM) for the reasonable costs associated with the change in channel at Ville Platte.

2. We believe the public interest would be served by proposing the substitution of Channel 229C1 for 229C2 at New Iberia, Louisiana, and the substitution of Channel 223A for 228A at Ville Platte, Louisiana, since the proposal could provide New Iberia with a wide coverage area FM service. Channel 229C1 can be allotted to New Iberia in compliance with the Commission's minimum distance requirements with a site restriction of 45.3 kilometers (28.1 miles) northeast to accommodate petitioner's desired site. Channel 223A can be allotted to Ville Platte in compliance with the Commission's minimum distance separation requirements and can be used at Station KVPI(FM)'s licensed site.[1] Therefore, we will direct an *Order to Show Cause* to the licensee of Station KVPI(FM) why its license should not be modified to specify operation on Channel 223A in lieu of Channel 228A. We recognize that the allotment of Channel 223A to Ville Platte conflicts with the presently licensed operation of Station KJEF(FM) Channel 224A, Jennings, Louisiana. However, the license of Station KJEF(FM) has been modified to specify Channel 225C2 and the station has been issued a construction permit on the new channel (BPH-890221IC). *See* 3 FCC Rcd 4611 (1988). We will serve a copy of this *Notice* on Station KJEF(FM).

3. As requested, we also propose to modify the construction permit for Channel 229C2 at New Iberia to specify operation on Channel 229C1. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest for the use of Channel 229C1 at New Iberia or require petitioner to demonstrate the availability of an additional equivalent class channel.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
New Iberia, Louisiana	229C2, 256C	229C1, 256C
Ville Platte, Louisiana	228A	223A

5. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Ville Platte Broadcasting Co., Inc., licensee of Station KVPI(FM), Ville Platte, Louisiana, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 223A as proposed herein instead of the present Channel 228A.

6. Pursuant to Section 1.87 of the Commission's Rules, Ville Platte Broadcasting Co. may, not later than **May 6, 1991,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Ville Platte Broadcasting Co. to furnish additional information. If Ville Platte Broadcasting Co. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Ville Platte Broadcasting Co. will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

7. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to Ville Platte Broadcasting Company, Inc., P.O. Box Drawer J, Ville Platte, Louisiana, 70586 [licensee of Station KVPI(FM)], and Jennings Broadcasting Company, P.O. Drawer 1248, Jennings, Louisiana, 70546 [licensee of Station KJEF(FM)].

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **May 6, 1991,** and reply comments on or before **May 21, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Stuart A. Shorenstein, Esq.
Lowenthal, Landau, Fischer & Zieger, P.C.
250 Park Avenue
New York, New York 10177
(Counsel for petitioner)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 229C1 at New Iberia are North Latitude 30-20-00 and West Longitude 91-32-00. The coordinates for Channel 223A at Ville Platte are North Latitude 30-41-39 and West Longitude 92-18-46.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-58

In the Matter of

Amendment of Section 73.202(b), RM-7419
Table of Allotments
FM Broadcast Stations
(Caldwell, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 6, 1991; Released: March 15, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it an "Amendment" to a petition for rule making filed by Roy E. Henderson ("Henderson"), permittee of Station KHEN, Channel 236A, Caldwell, Texas, proposing the substitution of Channel 236C2 for Channel 236A at Caldwell, and modification of the Station KHEN construction permit to specify operation on Channel 236C2.[1,2] Henderson stated that he will apply for the upgraded channel if allotted.

2. Channel 236C2 can be allotted to Caldwell in compliance with the Commission's minimum distance separation requirements, with a site restriction of 32.7 kilometers (20.3 miles) northeast to avoid short spacings to Station KNFO, Channel 238C, Waco, Texas, and Station KVIC, Channel 236C1, Victoria, Texas. [3] The maximum site restriction at which we can normally predict compliance with the 70 dBu principal city coverage requirement is 32.6 kilometers. Accordingly, Henderson will be expected to submit an engineering exhibit by the comment date showing compliance with the principal city coverage requirement of Section 73.315(a) of the Rules. As requested, we will also propose to modify the authorization for Station KHEN to specify operation on Channel 236C2. In accordance with Section 1.420(g)(3) of the Commission's Rules, we will not accept competing expressions of interest for use of the channel at Caldwell or require Henderson to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. We believe that it would be in the public interest to propose the substitution of Channel 236C2 for Channel 236A at Caldwell, Texas, since it could enable Station KHEN to expand its service area. Accordingly, we seek comments on the proposed amendment of the Table of FM Allotments, Section 73.202(b) of the Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Caldwell, Texas	236A	236C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 6, 1991,** and reply comments on or before **May 21, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or his counsel or consultant, as follows:

Robert J. Buenzle
12110 Sunset Hills Road
Suite 450
Reston, Virginia 22090
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The "Amendment" filed December 19, 1988, supplements a defective petition for rule making filed by Henderson in April of 1988. The petition was originally filed in conjunction with MM Docket No. 88-48, but was not considered in that proceeding. Henderson filed an application for review of that action. Final resolution of that application for review is pending. We will consider the "Amendment" as a petition for rule making filed December 19, 1988. Final resolution of this proceeding is contingent upon the resolution of the application for review filed by Henderson in MM Docket No. 88-48.

[2] In order to accommodate this upgrade, the "Amendment" proposed the substitution of Channel 259A for Channel 235A at Huntsville, Texas. In a *Memorandum Opinion and Order* in MM Docket No. 87-209, we substituted Channel 259A for Channel 235A at Huntsville, Texas. 4 FCC Rcd 3899 (1989). As a consequence, it will not be necessary to consider this aspect of the proposal.

[3] Site coordinates for Channel 236C2 at Caldwell are 30-45-24 and 96-28-05.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-521

In the Matter of

Amendment of Section 73.202(b), RM-7465
Table of Allotments,
FM Broadcast Stations.
(Clinton, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 6, 1991; Released: March 15, 1991

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 7666 (1990), issued in response to a petition filed by on behalf of Weber-King Broadcasting ("petitioner"), licensee of Station KHPQ(FM), Channel 221A, Clinton, Arkansas, proposing the substitution of Channel 221C3 for Channel 221A and modification of its license to specify operation on the higher powered channel. Petitioner filed supporting comments in response to the *Notice*.[1] No other comments were received.

2. As indicated in the *Notice*, Channel 221C3 can be allotted to Clinton, Arkansas, at the petitioner's suggested site located 19 kilometers (11.8 miles) east of the community,[2] consistent with the minimum distance separation requirements of the Commission's Rules. Additionally, as previously stated in the *Notice*, there will be no overlap of the proposed 1 mv/m contour of Station KHPQ(FM) at Clinton with the Grade B contour of any Channel 6 television station.

3. In view of the above, we believe the public interest would be served by substituting Channel 221C3 for Channel 221A at Clinton, Arkansas, since it would provide an expanded coverage FM service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Weber-King for Station KHPQ(FM), to specify operation on Channel 221C3 in lieu of Channel 221A, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 29, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Clinton, Arkansas	221C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license issued to Weber-King Broadcasting for Station KHPQ(FM), IS MODIFIED effective **April 29, 1991,** to specify operation on Channel 221C3 in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner's comments were filed after the period specified therefor in this proceeding, but were accompanied by a request for their acceptance. Since this is an uncontested proceeding, we will accept petitioner's comments for the purpose of expressing its continuing interest. *See* Section 1.425 of the Commission's Rules; *see also Alamogordo, New Mexico*, 25 FCC Rcd 7407 (1990).

[2] Coordinates at the petitioner's specified site for Channel 221C3 at Clinton are 35-39-52 and 92-16-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-413

In the Matter of

Amendment of Section 73.202(b), RM-6764
Table of Allotments,
FM Broadcast Stations.
(Brusly, Louisiana, and Woodville,
Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 7, 1991; Released: March 15, 1991

By the Acting Chief, Allocations Branch:

1. At the request of Livingston Communications, Inc. ("petitioner"), former permittee of Station KIEZ(FM), Channel 242A at Brusly, Louisiana, the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 7059 (1989), proposing the substitution of Channel 241C2 for Channel 242A at Brusly, Louisiana, and modification of its authorization to specify operation on the higher powered channel. In order to accommodate the allotment of Channel 241C2 to Brusly, the petitioner proposed the substitution of Channel 299A for then vacant but now applied for Channel 240A at Woodville, Mississippi.[1] Petitioner filed comments supporting the channel substitutions and modification of its authorization. McForhun, Inc., successor-in-interest to the petitioner,[2] filed comments stating its intention to apply for Channel 241C2 and to modify Station KIEZ(FM)'s facilities accordingly. No other comments were received.

2. We believe the public interest would be served by substituting Channel 241C2 for Channel 242A at Brusly, Louisiana, and substituting Channel 299A for Channel 240A at Woodville, Mississippi, since it would provide Brusly with an expanded coverage area FM service. Channel 241C2 can be allotted to Brusly, Louisiana, in compliance with the Commission's minimum distance separation requirements with a site restriction of 27 kilometers (16.8 miles) northeast of the city to accommodate petitioner's desired site. [3] Channel 299A can be substituted for Channel 240A at Woodville, Mississippi, consistent with the minimum distance separation requirements without a site restriction.[4] PDB will be allowed to amend its application to specify Channel 299A at Woodville. This may be achieved without loss of "cut-off" status since no upgrade in the class of channel will result. *See Salamanca, NY and Bradford, PA*, 50 FR 26208, June 25, 1985, and *Sanibel, FL*, 50 FR 32706, August 14, 1985. As proposed, we will also modify Station KIEZ(FM)'s construction permit to specify operation on Channel 241C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 29, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Brusly, Louisiana	241C2
Woodville, Mississippi	299A

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of McForhun, Inc., for Station KIEZ(FM), Brusly, Louisiana, IS MODIFIED to specify operation on Channel 241C2, in lieu of Channel 242A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That, the Secretary of the Commission SHALL SEND a copy of this *Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicant for Channel 240A at Woodville, as follows: PDB Broadcasting Company, 623 Northwest Avenue, McComb, Mississippi 39648.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] After the *Notice* was issued, PDB Broadcasting Company ("PDB") filed an application (BPH-890712MH) for Channel 240A at Woodville.

[2] McForhun, Inc., is now the licensee of Station KIEZ(FM), pursuant to the Commission grant of the assignment of petitioner's construction permit on June 26, 1989.

[3] The coordinates for Channel 241C2 at Brusly, Louisiana, are North Latitude 30-30-00 and West Longitude 91-00-00.

[4] The coordinates for Channel 299A at Woodville, Mississippi, are North Latitude 31-06-12 and West Longitude 91-18-00. We note that Channel 299A can also be used at the site proposed by PDB in its pending application (North Latitude 31-07-13 and West Longitude 91-20-32).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-98

In the Matter of

Amendment of Section 73.202(b), RM-6638
Table of Allotments,
FM Broadcast Stations.
(Davis and Winters, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 6, 1991; Released: March 15, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 3747 (1989), issued in response to a petition filed by Eric R. Hilding, d/b/a Hilding Communications ("petitioner"). The *Notice* proposed the allotment of FM Channel 288A to Winters, California, as that community's first local broadcast service. In order to accommodate the use of Channel 288A at Winters, the *Notice* also proposed the substitution of Channel 282A for Channel 288A at Davis, California, and the modification of the license of Station KLCQ (formerly Station KYLO), Channel 288A, Davis, accordingly. Petitioner filed comments in support of the proposal. Samuel and Deborah Idas ("Idas") filed an expression of interest in the proposed Winters allotment. Miklos Benedek, Vice President of KYLO Radio, Inc. ("KYLO"), licensee of Station KLCQ, Davis, filed comments supporting the proposed channel substitution at Davis. A number of pleadings were filed after the close of the comment period to this proceeding.[1] In addition, petitioner, Quick, Idas, and KYLO filed a "Joint Petition to Accept Late Filing and Joint Comments for Recommended Action" ("Joint Petition").[2]

2. The Joint Comments request withdrawal of the request for the Winters allotment, but not the request for the Davis substitution. Petitioner and Idas withdraw their expressions of interest in the Winters allotment. The parties believe that the proposed substitution at Davis is in the public interest since it will increase service and diversity of programming in the Winters/Davis regional area and eliminate Station KLCQ's current "double-grandfathered" short spacing to two channels.

3. We have reviewed the pleadings before us and find that the public interest would be served by the substitution of FM Channel 282A for Channel 288A at Davis, California, because it would allow Station KLCQ to increase its power to 6 kilowatts, thereby increasing its service area population. The substitution requires a relocation of Station KLCQ's transmitter site. [3] The substitution at Davis can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules with a site restriction 12.2 kilometers (7.6 miles) north of the community to avoid short spacings to Station KHOP, Channel 281B, Modesto, California, and Station KFOG, Channel 283B, San Francisco, California. As requested, we will also modify KYLO's license for Station KLCQ to specify operation on Channel 282A. Since all expressions of interest for the allotment of FM Channel 288A to Winters, California, have been withdrawn, we will not allot the channel to that community. Finally, no party will be required to reimburse KYLO for costs incurred in modifying Station KLCQ's facilities from Channel 288A to Channel 282A, as the modification is not required to accommodate any other proposal.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 29, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Davis, California	282A

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KLCQ, Davis, California, IS MODIFIED, effective **April 29, 1991,** to specify operation on Channel 282A in lieu of Channel 288A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the license (BLH-790117AD) except the channel, as specified above. Any other changes, except for those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301); and

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with its license (BLH-790117AD) except for the channel as specified above and a license application (FCC Form 302) is filed within ten (10) days of commencement of program tests.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Report and Order* to the licensee of Station KLCQ(FM) as follows: Miklos Benedek, KYLO Radio, Inc., d/b/a KLCQ, Route 2, Box 2980, Davis, CA 95616.

7. IT IS FURTHER ORDERED, That the proposal of Eric Hilding, d/b/a Hilding Communications, insofar as it proposes the allotment of Channel 288A to Winters, California, IS DISMISSED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] These pleadings include Comments of Quick Broadcasting, Inc. ("Quick"), licensee of Station KUIC, Vacaville, California, opposing the Winters proposal and a Petition to Accept Late Filed Comments; petitioner and KYLO's Joint Opposition to Petition to Accept Late Filed Comments and a supplement thereto; Quick's Reply; petitioner and KYLO's Motion to Accept Additional Comments and Statement for the Record; petitioner and KYLO's Motion to Accept Supplement to Additional Comments; and Quick's Reply to Motion to Accept Additional Comments.

The Commission's Rules do not contemplate acceptance of comments after the close of the comment period. *See* Commission Rule 1.415(d). In any event, even if we were to accept the unauthorized pleadings, they would be rendered moot by Quick's subsequent withdrawal of its opposition. We will, however, accept petitioner and KYLO's Joint Opposition to Petition to Accept Late Filed Comments to the extent that they propose different site coordinates for Station KLCQ at Davis.

[2] Because the Joint Petition will assist us in resolving this proceeding, we will authorize its acceptance. *See* Commission Rule 1.415(d).

[3] Coordinates for Channel 282A at Davis are North Latitude 38-39-09 and West Longitude 121-43-32 as requested in petitioner and KYLO's Joint Opposition. *See* note 1.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 15, 1991

Report No. DS-1061

REMINDER TO APPLICANTS FOR DOMESTIC SATELLITE EARTH STATIONS CONCERNING REQUIREMENT FOR ENVIRONMENTAL EVALUATION

The Commission's rules implementing the National Environmental Policy Act (47 CFR Sections 1.1301-1.1319) require that we consider whether Commission actions in licensing or authorizing facilities may significantly affect the quality of the human environment. In making this determination we rely on information provided by applicants. We would like to remind applicants that all environmental factors listed in Section 1.1307, paragraphs (a) and (b), of the FCC's rules must be considered.

Regarding Section 1.1307(b) applicants are required to consider the potential human exposure to radio frequency radiation from a transmitting satellite earth station. Applicants must consider exposure of both workers and the general public as described in the rules and as discussed in the Commission's OST Bulletin No. 65, "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation." This bulletin contains several sections that are relevant to potential exposure from satellite earth stations, including a section on calculations for aperture antennas.

Copies of Bulletin 65 (Order Number PB 86-127081) can be ordered from:

National Technical Information Service (NTIS)
U.S. Department of Commerce
1-(800) 336-4700 or 1-(800) 553-NTIS

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 15, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELL ATLANTIC'S PETITION FOR WAIVER OF THE COMPUTER II RULES TO OFFER COIN MESSAGE DELIVERY SERVICE ON AN INTEGRATED BASIS

On February 12, 1991, Bell Atlantic filed a petition for waiver of the Computer II rules to offer coin message delivery service (CMDS) on an integrated basis. According to Bell Atlantic, CMDS allows a caller from a pay telephone to deliver a message to a person whose telephone is busy or is not answered. Bell Atlantic states that, in its region, there were three hundred million uncompleted coin calls last year and that coin messaging would enable the completion of tens of millions of these calls.

Bell Atlantic states that CMDS was described in its approved Comparably Efficient Interconnection (CEI) plan for voice messaging services. Bell Atlantic states, however, that implementation of CMDS has been delayed because the necessary equipment has not been available. Bell Atlantic states that the equipment has now been developed, and that the only difference between CMDS and the service described in its voice messaging CEI plan is that the network, rather than the caller, actually dials the voice messaging processor. In addition, Bell Atlantic states that CMDS requires an additional underlying basic service. Finally, Bell Atlantic states that, consistent with CEI requirements, it will connect its public telephone service to other enhanced service vendors on the same basis as it connects its own enhanced services.

Interested parties are to file comments on this petition for waiver by **April 9, 1991,** and reply comments by **April 24, 1991,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Melissa Newman, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for records duplication: Downtown Copy Center, 1114 21st Street, N.W., Suite 140, Washington, D.C. 20037. Copies of Bell Atlantic's petition for waiver can be obtained from the Downtown Copy Center at (202) 452-1422.

For further information contact Melissa Newman, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-9342.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 15, 1991

Report No. DS-1060

RELAXATION OF LOW POWER TRANSMITTER NOTIFICATION REQUIREMENT AT 14.0 TO 14.5 GHz

The use of domestic satellite earth stations for low power transmissions in the 14.0 to 14.5 GHz band has increased significantly in recent years. This greater usage has been associated with the introduction of Very Small Aperture Terminal (VSAT) systems. It is estimated that greater than 20,000 VSAT earth stations are presently in use in the United States, and this number seems likely to increase several times by the end of the decade. We have taken into consideration comments from users of small earth stations and we believe that the public interest is served by the following relaxation of our filing requirement. Since substitution of technically equivalent units does not result in increased interference, there is no reason to continue to impose a burden of filing costs and fees on the licensees. This relaxation of requirement also reduces the Commission's application processing burden.

Effective immediately, applications for domestic satellite earth stations are no longer required to specify the manufacturer and model of transmitters that are operated in the 14.0 to 14.5 GHz band and produce output power of 10 watts or less. This relaxation, however, does not allow for increasing the power transmitted from an earth station. Licensees may also substitute such transmitters with equivalent units without notification to the Commission.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New York Telephone Company — Transmittal No. 1104

Revisions to Tariff F.C.C. No. 41

ORDER

Adopted: March 8, 1991; Released: March 8, 1991

By the Chief, Common Carrier Bureau:

1. On December 11, 1990, New York Telephone Company (NYT) filed Transmittal 1104, revising its Tariff F.C.C. No. 41 to offer "NYNEX Alternate Serving Wire Center" (NASWC). NASWC would be an optional feature of NYT's fiber optic special access services to provide an alternative channel termination at a different serving central office, ensuring continuity of transmission in case of failure in the primary central office. NYT Transmittal 1104 Description and Justification (D&J) at Section 1, pp. 2-3. NYT states that initial deployment for NASWC would be in the main Manhattan business districts but that the option would be extended to other major centers in NYT's territory in the near future. *Id.* at Section 1, pp. 3, 6-7. NYT also states that it will provide NASWC to any customer requesting it within one year of that request, given a reasonable negotiated installation period and application of tariffed special construction charges where necessary. *Id.* at Section 1, p. 7.

2. NYT further states that NASWC for voice grade and DS1 services would be flat rated as to distance, but that NASWC for DS3 sevice would be distance sensitive. *Id.* at Section 2, p. 3. In addition, a customer wishing to avoid its normal serving wire center on both ends of a point to point circuit would pay two NASWC charges. *Id.* at Section 1, p. 4. Transmittal 1104 is scheduled to become effective March 10, 1991.

3. Metropolitan Fiber Systems, Inc. (MFS) has filed a petition to reject or to suspend and investigate Transmittal 1104. First, MFS charges that NASWC is inherently vague and discriminatory because initially it will be available (without costly special construction) only in Manhattan. MFS Petition at 3-7. In particular, MFS argues that the first customer who agrees to pay special construction charges in a particular area where the necessary facilities for NASWC are not already deployed will become the victim of unreasonable discrimination relative to subsequent customers in that area who subscribe to NASWC after it has been generally tariffed. *Id.* at 4-5.[1]

4. MFS also claims that NASWC for DS3 service is limited to customers with electrical interfaces, thereby excluding customers with optical interfaces. *Id.* at 7-8. Similarly, MFS complains that the inclusion of a distance sensitive element in the NASWC rate structure for DS3 service discriminates against customers who want that option, compared to customers who want it for DS1 service. *Id.* 8-9. Finally, MFS contends that NYT's cost support for NASWC is deficient, particularly if a customer seeks to avoid the primary central office on each end of the path, because the interoffice channel mileage element would be counted twice. *Id.* at 10-11.

5. NYT's opposition responds to the charge of vagueness and geographical discrimination by reiterating that it has plainly said NASWC would be available anywhere in NYT's service territory at uniform prices within one year of a request for the service, subject only to reasonable interval negotiations and tariffed special construction arrangements. NYT Opposition at 2-4. NYT further argues that MFS's concern over limitation of DS3 service to electrical interfaces is unfounded because this limitation only applies to NYT's "Option 2" service, in which the customer selects a point in an underground conduit at which it interfaces with NYT's service. NYT explains that this configuration is not appropriate for NASWC because the customer in effect selects the central office involved, whereas part of the essence of NASWC is carrier selection of the alternative central office. *Id.* at 5.

6. Regarding the inclusion of distance sensitive elements in NASWC only for DS3 channel terminations, but not for voice grade or DS1 service, NYT states that this rate structure difference simply mirrors the underlying services as already tariffed. *Id.* at 5-6. Finally, NYT responds to MFS's contention that having NASWC on both ends of a circuit would double-count interoffice mileage by clarifying that the NASWC option is primarily a redesigned channel termination at a new central office, and channel mileage has nothing to do with its pricing. *Id.* at 6-7.

7. The Common Carrier Bureau has reviewed Transmittal 1104, the description and justification describing it, the pleadings and all related submissions. We conclude that no compelling argument has been presented that the tariff revisions filed by NYT are patently unlawful and thus warrant rejection, or that suspension and investigation are warranted at this time.

8. Accordingly, IT IS ORDERED that the petition to reject or to suspend and investigate New York Telephone Company's Tariff F.C.C. No. 41, Transmittal No. 1104, filed by Metropolitan Fiber Systems, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] NYNEX subsequently requested special permission to file revisions to Transmittal 1104 which address this MFS argument, providing that in the event that facilities are reused, the company will make the necessary adjustment to the initial customer's account. *See* NYNEX Application No. 5, filed March 5, 1991. This request was granted on March 7, 1991. Since Transmittal 1104 was originally filed, on December 10, 1990, as revisions to NYT Tariff F.C.C. No. 41, NYT and New England Telephone and Telegraph Company have together consolidated their individual tariffs into NYNEX Telephone Companies Tariff F.C.C. No. 1. The Transmittal 1104 provisions, once effective, will be contained in that consolidated NYNEX tariff.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Booth American Company
d/b/a Anderson Cablevision
Complainant,

v. File No. PA 82-0068

Duke Power Company
Respondent.

ORDER

Adopted: March 7, 1991; Released: March 18, 1991

By the Chief, Accounting and Audits Division:

1. On July 6, 1982, Booth American Company, d/b/a Anderson Cablevision filed the above-captioned complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224, seeking a Commission determination that Duke Power Company had imposed unjust and unreasonable rates for cable television pole attachments. The Commission ruled in favor of the complainant, but subsequently the United States Court of Appeals for the Fourth Circuit reversed and remanded the case for further proceedings. *Duke Power Company v. FCC*, No. 84-2253 (4th Cir. June 15, 1987) remanding *Booth American Co. v. Duke Power Co.* (PA 82-068), FCC 84-440 (released Sept. 20, 1984). *See also Alabama Power Co. v. FCC*, 773 F. 2d 362 (D.C. Cir. 1985).

2. On October 2, 1989, counsel for both parties advised that there are no longer issues in controversy and requested dismissal of the pending complaint.

3. Accordingly, IT IS ORDERED, pursuant to Section 4 (i) of the Communications Act of 1934, as amended, 47 U.S.C. §154 (i), and authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that the complaint filed by Booth American Company d/b/a Anderson Cablevision IS DISMISSED and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 6, 1991

COMMENTS INVITED ON FLORIDA REGIONAL PUBLIC SAFETY PLAN AMENDMENT

The Commission has received a proposed amendment to the public safety radio communications plan for Florida (Region 9). Specifically, the Florida Region Committee approved the establishment of licensing benchmarks. The plan will add Subsection 4.7 to read as follows:

4.7 Licensing Benchmarks

Each channel allotment listed in Table III will remain in effect and incontestable for one year from the date of the initial FCC approval of this Section. Should future allotments of either initial or additional channels be made, they will remain in effect for one year from the FCC approval date(s) of those allotments. Channels which have not been applied for within their one year period will be re-allotted following a filing window for new or expanded needs. Such re-allotted channels will similarly remain in effect for one year from their FCC approval date. The term "applied for" means submission to the Region Committee for a complete license application meeting the requirements of Section 6 of this Plan. Channels applied for and approved by the Region Committee shall be subject to re-allotment if the application is not received by APCO within sixty (60) calendar days after the date of Region Committee approval. For the purposes of this Section, replacement of FCC designated channel numbers with alternate channel numbers to improve spectrum efficiency or reduce interference shall not be considered an allotment or re-allotment. An increase or reduction in the number of channels allotted to a jurisdiction shall not affect the benchmark date(s) of original or remaining channels. Channels allotted for the State of Florida Joint Task Force State Agency Law Enforcement Communications System are exempt from these benchmark requirements.

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, parties may file comments on or before **April 15, 1991** and reply comments on or before **April 30, 1991.** (*See* Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

In accordance with the Commission's Memorandum Opinion and Order in General Docket No. 87-112, Region 9 consists of the State of Florida. General Docket No. 87-112, 3 FCC Rcd 2113 (1988).

Comments should be clearly identified as submissions to **General Docket 90-119, Florida - Region 9,** and commenters should send an original and five copies to the Secretary, Federal Communications Commission, Washington, DC 20554.

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

BC Docket No. 82-763

In re Application of

ELBA DEVELOPMENT CORPORATION
(KQTV-TV)
St. Joseph, Missouri

File No. BPCT-801114KG

For a Construction Permit
for a Major Change

ORDER

Adopted: January 22, 1991; Released: January 28, 1991

1. In this proceeding, the Commission has considered the existing facilities of station KQTV-TV in St. Joseph, Missouri, by changing its transmitter site, increasing its antenna height, and directionalizing its antenna. The lengthy procedural history of this case is set forth in *Elba Development Corp.*, 5 FCC Rcd 6767 (1990).

2. Now before the Commission is a Motion for Dismissal of Application filed January 8, 1991 by TCS Television Partners, L.P., the successor in interest of Elba.[1] TCS requests the Commission to dismiss the application at issue in this proceeding. TCS recites that no consideration has been paid, promised, or received in connection with the dismissal of the application. No objection to TCS' motion has been received, and good cause has been shown for the dismissal of the application.

3. ACCORDINGLY, IT IS ORDERED, pursuant to the authority delegated under 47 C.F.R. § 0.251(f), that the Motion for Dismissal of Application filed January 8, 1991 by TCS Television Partners, L.P. IS GRANTED, and the application of Elba Development Corporation for a construction permit for a major change (File No. BPCT-801114KG) IS DISMISSED with prejudice.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Robert L. Pettit
General Counsel

by John I. Riffer
Associate General Counsel

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 7, 1991

ADVISORY COMMITTEE ON ADVANCED TELEVISION SERVICE IMPLEMENTATION SUBCOMMITTEE MEETING CANCELLATION

The meeting of the Implementation Subcommittee of the Advisory Committee on Advanced Television Service scheduled for March 20, 1991, at 10:00 a.m. (DA 91-221; 56 FR 8351, February 28, 1991; DR Doc 91-4648) has been cancelled. The next Implementation Subcommittee meeting will be announced at a later date.

Any questions regarding the cancellation of this meeting should be directed to Dr. James J. Tietjen at (609) 734-2237 or David R. Siddall at (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 2.106 of the Commission's Rules to Establish a New Radio Service for Local Area High Speed Data Communications Among Personal Computing Devices	RM-7618

ORDER EXTENDING TIME FOR COMMENTS AND REPLY COMMENTS

Adopted: March 8, 1991; Released: March 11, 1991

By the Office of Engineering and Technology:

1. NCR Corporation (NCR) has filed a *Motion for Extension of Time* requesting that the time for filing comments to Apple Computer, Inc.'s *Petition for Rulemaking* in the above-captioned proceeding be extended for 45 days.

2. The reasons that NCR requests the extension are so that the IEEE 802 LAN Standards Committee, which will meet on March 11, 1991, will be able to provide comments to the proceeding and so that NCR can develop comprehensive comments, including inputs from its overseas product development group.

3. The Commission believes that, in order to develop as complete a record as possible in this proceeding, an extension of time is desirable to allow all interested parties sufficient time to prepare comments. However, in the interest of expediting consideration of this petition, we shall only grant a 30-day extension. Accordingly, IT IS ORDERED, that the time allowed for filing comments IS EXTENDED to **April 10, 1991.** Further, to provide adequate time for reply comments, we are extending the reply comment period by 15 days to make the reply comment period 30-days long. Therefore, the time allowed for filing reply comments IS EXTENDED to **May 10, 1991.**

4. This action is taken pursuant to authority found in Section 4(i), 302, and 303 of the Communications Act of 1934, as amended, 47 USC Sections 154(i), 302, and 303, and pursuant to Sections 0.31 and 0.241 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-108

In re Applications of

SHARRON ANNETTE HALEY	File No. BPH-880310MZ
SUMTER RADIO PARTNERS	File No. BPH-880310NM
IRIS COMMUNICATIONS, INC.	File No. BPH-880310NS

For Construction Permit for
New FM Station, Channel 234A,
Sumter, South Carolina

MEMORANDUM OPINION AND ORDER

Adopted: March 5, 1991; Released: March 19, 1991

By the Review Board: BLUMENTHAL and ESBENSEN. Chairman MARINO absent.

1. Before the Review Board is an appeal, filed pursuant to 47 CFR § 1.301(a)(1), by Sharron Annette Haley (Haley) from *Memorandum Opinion and Order* (*MO&O*), FCC 91M-246, released January 23, 1991, of Administrative Law Judge Richard L. Sippel (ALJ), dismissing her application from this proceeding.

BACKGROUND

2. It is undisputed that, when Haley filed her application in this proceeding on March 10, 1988, she certified that she was not financially qualified to construct and operate as proposed, but qualified her "no" response to FCC Form 301, Section III with the following representation: "Financial arrangements are being made; an amendment will be filed in the future." However, the *Hearing Designation Order*, 5 FCC Rcd 1713 (1990) (HDO), issued some two years later inadvertently failed to specify a financial issue against Haley.[1] Thereafter, in response to an appropriate motion (and Haley's concession that addition of a financial qualifications issue against her was warranted), the ALJ added an issue by *Memorandum Opinion and Order*, FCC 90M-1475, released June 5, 1990, indicating that he would take evidence:

> To determine whether Sharron Annette Haley is financially qualified to build and operate the proposed station.

The ALJ there further ordered that Haley would be required to file an amendment, not later than June 29, 1990, "disclosing the status of her financial qualifications, which shall include a declaration reciting all steps taken from March 10, 1988 to the date of her declaration to obtain a financing commitment."

3. On June 29, 1990, Haley filed a Petition for Leave to Amend, and therein declared: (1) "by the attached amendment Ms. Haley does *not* propose any change in the financial certification contained in her application" (emphasis in original); and, (2) "that the amendment attached hereto *be accepted for reporting purposes only* . . . ." (emphasis added). Additionally, Haley maintained (Amendment at pps. 1-3; emphases added):

> Ms. Haley's application was filed on March 10, 1988. Section III of her application indicates that she was unable to certify that she had sufficient net liquid assets on hand or that sufficient funds were available from committed sources to construct and operate her proposed station for three months without revenue. Following this representation, Ms. Haley indicated that "Financial arrangements are being made; an amendment will be filed in the future."
>
> * * *
>
> Over the following several months, Ms. Haley provided copies of her business plans to banks in Sumter, Manning and Florence, South Carolina and spoke to officials of those banks about obtaining a letter of credit. Sometime in early May of 1988 she received the letter from National Bank of South Carolina in Sumter dated May 8, 1988 attached hereto . . . . She forwarded this letter to her Washington counsel, who informed her that the letter did not meet FCC standards for demonstrating her financial qualifications. Ms. Haley did not receive written responses to her request from any of the other banks. After making these various contacts with bankers, *Ms. Haley reached the conclusion that she did not possess the type of collateral needed to obtain the loan letter she was requesting from the banks*.
>
> After discussing the matter further with her counsel, she became aware that the FCC would not accept an amendment to her application concerning the certification of her finances and that she would be required to demonstrate her financial ability to construct the station at a hearing . . . . Since Ms. Haley did not know when her application might be designated for hearing, *she decided to discontinue her efforts until her application was designated for hearing*. She believed that any estimates of costs and sources of funding she might obtain would likely be outdated by the time the hearings were held.
>
> Following the designation for hearing of her application, she again consulted with counsel and on the basis of his advice attempted to find someone who would assist her in providing the collateral needed to obtain the necessary loan letter from a bank. After speaking with the official of the National Bank of South Carolina, who had provided the May 8, 1988 letter described above, Ms. Haley

> contacted Mr. J. C. Pelfrey, a long time friend, who agreed to personally guarantee any loan Ms. Haley might obtain to finance her proposed station in Sumter and to pledge any collateral the bank might require. Ms. Haley then updated her business plan and provided it to the bank along with a description of Mr. Pelfrey's agreement. On the basis of her presentation and Mr. Pelfrey's agreement the bank issued Ms. Haley the letter attached hereto as Exhibit C [dated June 15, 1990] in the amount of $250,000.

4. Haley made no attempt to demonstrate "good cause" for the filing or acceptance of her amendment, pursuant to 47 CFR § 73.3522(b) (post-designation amendments) and *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970),[2] despite the ALJ's invitation at a June 1, 1990 prehearing conference to make such a showing. *See* FCC 91M-246, *supra*, at para. 9. Thus, in accepting Haley's amendment for reporting purposes only (as Haley herself had expressly stipulated), the ALJ declared in *Memorandum Opinion and Order*, FCC 90M-2724, released August 29, 1990:

> Thus, the amendment is merely to disclose facts; the amendment does not meet the added issue [and] merely provides information which the parties need in order to plan their discovery and trial needs.

5. A hearing on all extant issues was held on September 17, 1990, including the taking of evidence on Haley's financial qualifications. However, in response to a later (November 21, 1990) joint motion to dismiss Haley's application, the ALJ released the *MO&O* under appeal here, holding that: (1) Haley had never filed an amendment to her original financial certification changing her initial negative response to "yes"; (2) Haley failed to demonstrate good cause for the acceptance of her financial qualifications amendment; (3) Haley failed to demonstrate that her proposed loan guarantor, J. C. Pelfrey, "will be available" to guarantee the loan, because Haley opposed Pelfrey's appearance and Pelfrey did not testify at hearing; and, (4) even assuming Pelfrey's guarantee, the proposed lending institution required "such other collateral as [the bank] may deem necessary when the loan is made," and that such an "open-ended" statement failed to establish "reasonable assurance" of funds. *See* FCC 91M-246, *supra*, paras. 7-11.

6. In her appeal, Haley now argues that: (1) despite her earlier claim that her amendment was for "reporting purposes" only, it operated as a "curative amendment"; (2) her failure to amend her original "no" financial certification is merely "an elevation of form over substance"; (3) her amendment met her burden of proof on the financial issue specified against her; (4) her opposition to Pelfrey's personal appearance was irrelevant, because she waived all objections to the introduction of Pelfrey's deposition into evidence; and (5) the ALJ's view that a June 15, 1990 bank letter contained "an open-ended requirement for further collateral" was in error. Remarkably, however, Haley does not even address her failure to attempt to demonstrate "good cause" for the filing and acceptance of her late amendment.

DISCUSSION

7. In *Edwin A. Bernstein*, 4 FCC Rcd 8420 (Rev. Bd. 1989), *review denied*, 5 FCC Rcd 2843 (1990) (*appeal pending, see supra* note 1), we affirmed the disqualification of an applicant that did not certify that it was financially qualified when it originally filed its application; and, as here, a financial issue was inadvertently omitted from the HDO. The *Bernstein* applicant had taken "no serious measures" to become financially qualified for twenty-one months following the filing of its application; it continued to be financially unqualified for some six months after release of the HDO; and it also conceded that addition of a hearing issue on its finances was fully warranted. In denying that applicant's appeal from its dismissal by the ALJ, the Board declared (4 FCC Rcd at 8422):

> In view of [the applicant's] utter lack of diligence, and its unarguable failure to meet the required "good cause" test for post-designation amendment, the dismissal of its application was clearly the appropriate remedy. No equities whatever excuse this applicant's slothfulness. We cannot permit an applicant to disrupt a proceeding . . . when it has known for the twenty-seven months prior thereto that it had no financing, and never sought in a diligent, timely manner the most basic resource it needed to legally prosecute its application.

8. The same result must obtain here. As we have consistently held, applicants for broadcast facilities must be found to be financially qualified to construct and operate as proposed. *See* 47 U.S.C. § 308(b). To establish its financial qualifications, an applicant must have, at a minimum, "reasonable assurance" of sufficient net liquid assets on hand or sufficient funds available from committed sources to construct and operate the proposed facility for three months, assuming no revenue. *Scioto Broadcasters Limited Partnership*, 5 FCC Rcd 5158 (Rev. Bd. 1990); *JAM Communications, Inc.*, 4 FCC Rcd 3754 (Rev. Bd. 1989). A broadcast applicant must be "ready, willing and able" to meet the Commission's financial requirements, *Dutchess Communications*, 101 FCC 2d 243, 254 (Rev. Bd. 1985); *Tri-State Communications*, 4 FCC Rcd 8258, 8259 (Rev. Bd. 1989), *recon. denied*, 5 FCC Rcd 534 (Rev. Bd. 1990), *review denied*, 5 FCC Rcd 6232 (1990), certainly once the hearing has been designated, unless some unanticipated event requires an application amendment. *Belo Broadcasting Corp.*, 68 FCC 2d 1313, 1320 (1978). *See also Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027, 1028 (Rev. Bd. 1983), *rev. denied*, FCC 84-119, released April 2, 1984, *aff'd by judgment sub nom. Royce Broadcasting Co. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985); *Northampton Media Associates*, 3 FCC Rcd 5164, 5169 (Rev. Bd. 1988), *rev. denied*, 4 FCC Rcd 5517 (1989); *Pepper Schultz*, 103 FCC 2d 1052, 1056 (Rev. Bd. 1986), *aff'd in pertinent part*, 2 FCC Rcd 1476 (1987) (appeal pending); *Washington's Christian Outreach* Inc., 99 FCC 2d 395, 404-405 (Rev. Bd. 1984) (subsequent history omitted).

9. Here, by her own admission, Haley was not qualified when she filed her application in March 1988. As in *Bernstein*, Haley discontinued her efforts to become financially qualified and filed nothing to overcome this critical deficiency for nearly two full years *after* filing her defective application. Nor did she attempt to meet the rigorous "good cause" test for post-designation amendments when she belatedly filed her "financial amendment." In light of

these fatal delicts, the ALJ had no legal alternative but to dismiss Haley's application. *See generally Carol Sue Bowen*, 6 FCC Rcd 10 (Rev. Bd. 1991), and *Marc A. Albert*, 6 FCC Rcd 13 (Rev. Bd. 1991).[3]

10. ACCORDINGLY, IT IS ORDERED, That "Sharron Annette Haley's Appeal from Order Dismissing Her Application," filed February 12, 1991, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] An identical oversight by the Mass Media Bureau's processing branch marked a dispute quite similar to the one before us in the case of *Edwin A. Bernstein, infra*. *See* Brief for FCC at 5, *Lefebvre v. FCC*, No. 90-1284 (D.C. Cir.), filed December 28, 1990. Because of the serious problems it encountered arising from applicants merely certifying to their financial qualifications, the Commission was compelled to abandon this financial "certification" procedure and to return to its prior requirement for appropriate documentation. *Revision of Form 301*, 4 FCC Rcd 3853 (1989).

[2] 47 CFR § 73.3522(b) provides that requests to amend an application more than 30 days after it has been designated for hearing "will be considered only upon written petition . . . and only upon showing of good cause for late filing." In *Erwin O'Conner*, 22 FCC 2d at 143, the Board held that:

> It is well established that, in satisfying the "good cause" criteria for postdesignation amendments, the moving party must demonstrate that it acted with due diligence; that the proposed amendment was not required by the voluntary act of the applicant; that no modification or addition of issues or parties would be necessitated; that the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate additional hearing; that the other parties will not be unfairly prejudiced; and that the applicant will not gain a competitive advantage.

[3] But for the fact that we affirm the ALJ's dismissal, we would add appropriate truthfulness issues against Haley based on the representation in her application that "[f]inancial arrangements are being made." *See Bernstein*, 4 FCC Rcd at 8422 n. 6. Haley never advised the FCC that she had abandoned her efforts to acquire financing, and the need for a candor issue would run counter to the *Erwin O'Conner* limitation on late amendments.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-21

In re Applications of

FRESNO FM LIMITED PARTNERSHIP	File No. BPH-861230MB
JOHN MARSHALL HOOKER d/b/a JMH BROADCASTING	File No. BPH-861230ME
JOHN EDWARD OSTLUND	File No. BPH-861231MD
VALLEY RADIO LTD., A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-861231ME
LAURA H. NORMAN	File No. BPH-861231MI

For Construction Permit for a
New FM Station on Channel 257A,
Fresno, California

Appearances

Lewis I. Cohen, John J. Schauble, and *Roy W. Boyce*, on behalf of Fresno FM Limited Partnership; *Terrence L. Bruiniers*, on behalf of John Marshall Hooker, d/b/a JMH Broadcasting; *Eric S. Kravetz* and *Chester F. Naumowicz*, on behalf of John Edward Ostland; *John M. Shoreman*, on behalf of Valley Radio Ltd., A California Limited Partnership; *Irving Gastfreund*, on behalf of Laura H. Norman; and *Norman Goldstein*, on behalf of the Chief Mass Media Bureau.

DECISION

Adopted: February 28, 1991; Released: March 19, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member BLUMENTHAL.

1. Of the original fourteen whose mutually exclusive applications were designated for consolidated comparative hearing, the Board has before it the exceptions, replies and supplemental pleadings addressed to the initial decision of ALJ Joseph Chachkin in *Carta Corp.*, 4 FCC Rcd 7973 (1989) (*I.D.*). An oral argument on the exceptions was held before the Board on March 23, 1990.

2. Upon the arguments then before us, the Board agreed with the virtually unanimous exceptions to the *I.D.'s* award of this Construction Permit to Fresno FM Limited Partners (Fresno FM), finding that applicant to be, just as claimed, a blatant sham of the very ilk recently noted by the Supreme Court in *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3025 n.48 (1990). Thus, the Board's *Memorandum Opinion and Order*, 5 FCC Rcd 3696 (1990), discredited the Fresno FM application, and it next remanded the proceeding to the ALJ to test the substitute comparative proposal of the ALJ's declared "runner-up," Carta Corp., whose original principal died in 1990. However, Carta Corp. elected not to test its substitute integration proposal at hearing, and it withdrew its application entirely rather than confront the questions of its opponents.[1] Having already rejected entirely the comparative proposal of Fresno FM, and in the wake of the withdrawl of Carta Corp., the Board now takes up the exceptions as they pertain to the other four viable applicants,[2] and it concludes that the application of Laura H. Norman should be granted.

JOHN MARSHALL HOOKER
d/b/a
JMH BROADCASTING

3. *Basic Qualifications*. By *Memorandum Opinion and Order*, FCC 88M-2940, released September 12, 1988, the ALJ added issues against JMH centering on the question of whether its sole principal had ceded *de facto* control of KEAP(AM), Fresno, California, a station licensed to Hooker since 1974,[3] and, further, whether pursuant to putative "time brokerage" agreements with successive entities, Fresno Hispanic Radio, Inc. and San Joaquin Valley Hispanic Radio,[4] any such *de facto* transfer of control additionally violated the alien ownership/control limits of 47 U.S.C. § 310(b). Upon review of the evidence, the ALJ concluded adversely against JMH on all of these issues, *I.D.*, paras. 106-118, to which conclusions JMH excepts.[5]

4. In heavily detailed findings of fact, the ALJ examined closely the relationship between Hooker and the time brokers to determine whether Hooker had, in fact, retained the requisite licensee control over KEAP or had so abdicated actual control as to have forfeited his basic qualifications. In part, the hearing record discloses as follows. Starting in October 1984:

> Nearly all of KEAP's air time has been sold to time brokers (Tr. 992). The maximum amount of time that HBC has retained in that period is 1 1/2 hours (Tr. 1018). From 1984 to 1988, the entire broadcast week except for Sunday from sign on to 3:00 p.m. was sold to brokers who programmed Spanish language programming (Tr. 992-993, 1032; JMH Ex. 6-A).

I.D. at para. 48. At the time of the 1988 hearing, HBC itself was providing KEAP with only 15 minutes (each Sunday) per week of non-brokered programming. *Id.*

5. In actual operation, the primary time broker, San Joaquin, maintained ten full-time employees, including a general manager/business manager, sales manager, and traffic manager, while HBC itself claimed three "employees" (*i.e.*, Hooker, his daughter Jonna, and a part-time Sunday disc jockey). HBC itself employed no program director, no news director, and no sales manager at

KEAP. Though Hooker posited an "inherent" right to replace any San Joaquin employee, his contract with the broker provided for, and HBC exercised, no such authority over the San Joaquin personnel actually operating the HBC station. *I.D.*, paras. 52-54. As to other personnel matters, HBC had never monitored for compliance with its model E.E.O. program or contacted the recruitment sources listed therein. *Id.*, para. 71. Even KEAP's 1987 Annual Employment Form was filed with the FCC by a San Joaquin employee, a filing which Hooker tellingly claimed was unauthorized and done without his knowledge, although HBC made no filing of its own with this agency as required by rule. *Id.*, para. 65.

6. Beyond the personnel structure, the ALJ looked to indicia of program supervision, another vital control criterion. He found that, whereas the time brokerage contract nominally reserved in HBC the right to select, direct, and control the programming of KEAP, the practice made utterly hollow the contract provision. Thus, the ALJ reported: (1) that although the time broker(s) programmed KEAP in the Spanish language (except for other time brokered religious programming from sign-on to 3 p.m. Sundays), *I. D.*, para. 48, Hooker spoke no Spanish, and neither he nor any HBC employee (such as there were) monitored KEAP broadcasts; (2) that to the degree that *anyone* monitored KEAP programming, it was one Dick Delgado, a time broker and San Joaquin announcer who "voluntarily" monitored the programming on an "intermittent basis" as a "favor" to Hooker, although Hooker had no prescribed arrangement with Delgado as to the frequency of monitoring, and Hooker did not know at hearing the specific nature and extent of Delgado's monitoring, *see id.*, paras. 57, 59-60; (3) that, insofar as public interest programming, while Hooker claims to have instructed San Joaquin to provide "fifteen minutes of public affairs programming per week," the broker had not complied, *id.*, para. 56; (4) that to the extent that significant community issues were identified at KEAP, such identification was made by San Joaquin's receptionist/traffic manager "who prepared lists of topics mentioned on the air," but "the lists were not used to determine what topics would be covered in public affairs programming." Hooker himself was uncertain of how the San Joaquin receptionist decided what issues to list (which lists Hooker looked at twice a year but did nothing more with), so that no meaningful procedures existed at KEAP for ensuring that any community issues identified were covered in programming, *see id.*, para. 58; and (5) that HBC emplaced no meaningful procedures to monitor or assure compliance with FCC rules and regulations, including (but not limited to) political opportunities, *see id.*, para. 67, sponsorship identification or lotteries, *id.*, para. 68, plugola or payola, *id.*, para. 69, or false advertising, *id.*, para. 70.

7. The ALJ also reviewed the financial arrangements for the operation of KEAP and found that, over and above the conventional block sale of air time to, and the resale of advertising time by, the broker: (1) San Joaquin paid "all operating and overhead expenses for the station's operation," *id.*, para. 62; (2) San Joaquin, not the licensee, was responsible for any monetary forfeiture assessed for violation of FCC rules, *id.*; (3) San Joaquin paid for KEAP's office construction as well as the real estate taxes on the station's premises (although Hooker owned the building), and San Joaquin (not HBC) was responsible for the station's liability and libel insurance, *id.*; and (4) there existed a 1985 option to purchase 15% of HBC's stock each year, sold to two San Joaquin principals, under which it appears that (at various times) amounts of $80 thousand and $50 thousand were placed in trust funds controlled by Hooker toward the acquisition of HBC stock. *Id.*, paras. 72-75.[6] So removed was HBC as a licensee that it failed to file a 1987 Ownership Report with the FCC, even after a letter expressly notifying it of the deficiency was sent to the station by the FCC. *Id.*, para. 66.

8. Without completely refuting the factual findings reflected above, HBC's exceptions are grounded deeply upon the claim that the ALJ's adverse conclusions on the *de facto* control issue(s) were engendered by the ALJ's "evident hostility to the concept of time brokerage," an attitude it considers "not consistent with current Commission policy." [7] It counters that current FCC policy does not disfavor any amount of time brokerage by a licensee,[8] or establish "any specific requirements or methodology for monitoring the content of foreign language programming,"[9] and that "[f]ar from abdicating responsibility for the operations of the station, Mr. Hooker and his daughter, who is now the General Manager, retain direct and immediate involvement in the day-to-day operations in the affairs of the station."[10]

9. *Discussion*. In 1980, the Commission revisited its past policies on time brokerage, declaring its understanding that:

> Generally, time brokerage refers to the practice of licensee sale of discrete blocks of time to a "broker" who then supplies programming to fill that time and sells the commercial spot announcements to support it. Both radio and television stations have engaged in the practice which has traditionally been used to provide specialized programming, including foreign language programming.

Time Brokerage Arrangements 48 RR 2d 763 at n.2 (1980). Therein, the Commission eschewed its own pervasive oversight of the practice and it pronounced that (*id.*, at 772):

> Because of the changes that have occurred in the almost four decades since *Metropolitan [Broadcasting Corp.*, 8 FCC 557 (1941)], it is time for the Commission to adopt a new policy. In an industry characterized by numerous specialized competitors and brokers and varied source of prepackaged programming, brokerage can often represent both a less expensive program sources for the individual licensee and an appropriate market response to the audience's fragmentation into preference groups too small to support an entire station. In the largest markets, some television stations also have become a potpourri of brokerage "formats." Neither licensees nor minority groups facing difficult economic circumstances should be discouraged from exploring programming alternatives that appear to reflect accurately both consumer wants and competitive incentives. Occasional abuse by an irresponsible licensee or broker does not warrant blanket regulatory discouragement of an enterpreneurial mechanism that is uniquely suited to support specialized

services. The Commission can control the occasional abuses, and believes that the potential for improved services outweighs any potential for harm.

10. Despite its newer *laissez faire* approach, however, the Commission repeatedly emphasized that its policy modification "does not diminish the licensee's ultimate responsibility for programming broadcast over his facility." *Id.*, at 765 (citing *Cosmopolitan Broadcasting Corp.*, 59 FCC 2d 558 (1976) (subsequent history omitted)); *see also id.*, at 768 ("[w]e believe that licensees must expect to retain control over, and responsibility for, all programming if they wish to remain public trustees rather than common carriers"). And, finally, as to compliance with core licensee responsibilities, "[w]hile asking the broker to share the responsibility is appropriate, it is no substitute for licensee vigilance." *Id.*

11. In determining whether arrangements with time brokers have crossed the line from, perhaps, merely an excusable lack of adequate oversight to a *de facto* transfer of control, a statutory offense of the first magnitude, *see, e.g., Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966), the Chief of the Commission's Mass Media Bureau just reiterated that:

> Generally, the principal indicia of control the Commission considers in determining whether an unauthorized transfer of control has taken place are station finances, personnel matters and programming. *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981).

Letter to Messrs. Russo and Cohn, 5 FCC Rcd 7586 (1990). There, in rejecting an allegation of licensee *de facto* transfer of control to a time broker, the Bureau found that the subject licensee had: (1) "retained its management personnel, including its General Manager, Business Manager, Traffic Director, Executive Secretary, and Chief Engineer," *id.*, at 7588 n.9; (2) retained, by written contract, full authority over programming and personnel, *see id.*, at 7587; and (3) retained control over station financing, leaving the broker merely the ordinary "profit of advertising revenues over brokerage fee." *Id.* In consequence, the Bureau concluded that the claim of a *de facto* transfer of control had not been there documented.

12. But the ALJ in the instant case did elaborately document that, far from exercising the " *licensee vigilance* " envisaged by the 1980 *Time Brokerage Arrangements*, HBC assumed the passive role of a common carrier after 1984. Though we concur with HBC that, in the main, "the amount of time brokerage is not the issue," *see id.*, 48 RR 2d at 768; *accord, Letter to Messrs. Russo and Cohn*, we also agree with the ALJ that the record evidence conclusively demonstrates that Hooker abdicated control over KEAP in a manner sharply at odds with this most fundamental Commission doctrine. Hooker retained no contractural control over the personnel using the station; he provided few, if any, mechanisms for ensuring compliance with FCC rules and policies; he engaged in virtually no systematic oversight over programming,[11] particularly in the areas of political broadcasts, false advertising, and public interest programming; and he did little more than collect "rent" for use of the spectrum, investing after 1984 scant resources of his own (or HBC's) to effect his inalienable public interest responsibilities. Indeed, "San Joaquin would have to pay any forfeiture assessed by [the FCC]" for a dereliction of those non-delegable responsibilities. *I.D.*, at para. 6, an abdication the FCC specifically forbade in its *Time Brokerage Arrangements*, *see* 48 RR 2d at 768, as plainly inconsistent with bedrock licensee accountability.

13. The Board fully appreciates that the Commission's 1980 *Time Brokerage Arrangements* policy intended to nourish foreign-language programming and that its 1983 *Elimination of Unnecessary Broadcast Regulation*, *supra* note 11, further eased the constraints on licensees who opt for the brokerage mode. At the same time, the Commission reiterated its caveat that latitude and lassitude in licensee supervision are not equally acceptable. This must be so because:

> A broadcast licensee is a public trustee, entrusted with the use of a precious public resource in return for its agreement to adhere to limited conditions imposed by this Commission. 47 U.S.C. § 301 (1970). From the first days of broadcast regulation, licensee control over the operation and management of their broadcast facilities has been central to the proper functioning of the regulatory scheme mandated by Congress and enforced by the Commission. Without licensee supervision of and control over the operation of their stations, the key element of the present system - accountability to the public and the Commission - would be lost.

Trustees of the University of Pennsylvania, 69 FCC 2d 1394, 1396 (1978). By any standard, and certainly the pillars of pertinent precedent, Hooker was the licensee of KEAP in name only, *compare Silver Star Communications - Albany, Inc.*, 3 FCC Rcd 6342 (Rev. Bd. 1988), with control (if *any*) over core licensee responsibilities in the hands of his paying spectrum tenants. So absolute was his abdication on this record, *see, e.g., Cosmopolitan Broadcasting*, *supra*,[12] and so callous was his indifference to Commission-imposed duties, that Hooker concurrently abandoned his privilege to be entrusted with licenseeship.[13] We second the determination that Hooker abdicated *de facto* control over KEAP; we further hold that his violation of the Communications Act was all but total and egregious, and that it stands independently as a predicate for deeming JMH thoroughly unqualified for this new broadcast facility.[14]

LAURA H. NORMAN

14. Ms. Norman is the sole proprietor of her applicant, and she received from the ALJ comparative credit for her pledge to integrate full-time as general manager of her proposed facility. *I.D.*, para. 101. That management integration proposal was amplified by her long-time (since 1978) residence in Fresno, and enhanced by the Commission's "female preference" policy.[15]

15. *Real-Party-In-Interest.* At hearing, and in the exceptions, the fact that Norman proposed to finance her station with a loan from her father raised demands to declare him a party to her application. The ALJ rejected such calls, *I.D.*, para. 131, and we find nothing in the record or the exceptions that would warrant reversing the charges. The Commission's current policy, exemplified generally in *Doylan Forney*, 5 FCC Rcd 5423, 5427 (1990), is that undue influence does not necessarily follow finances; and the Board has recently explained again the

additional factors it looks to for real-party-in-interest indicia. *Rayne Broadcasting Company, Inc.*, 5 FCC Rcd 3350 (Rev. Bd. 1990) (real-party-in-interest issue added based on father's highly active role). Certainly none of the more critical non-financial factors present in *Rayne* mar the Norman application. As in *Magdalene Gunden Partnership*, 2 FCC Rcd 5313, 5316 (Rev. Bd. 1987) (subsequent history omitted), no facts have been offered sufficient to disturb Norman's claim of sole proprietorship. Agreeing fully with the legal analysis set forth in para. 131 of the *I.D.*, the comparative credit awarded her by the ALJ remains basically undisturbed.

JOHN EDWARD OSTLUND

16. Like Norman, Ostlund is the sole proprietor of his applicant, *I.D.*, para. 83; he also proposes full-time management integration, has lived in Fresno for about 6-8 years, boasts a number of civic activities in the service area, and worked in the broadcasting business from 1970-1974. *Id.*, paras. 84-91.

17. *Integration.* Several exceptors challenge the ALJ's award of full-time integration credit to Ostlund.[16] They point out that Ostlund is the sole owner, director, and president of Jeffrey/Scott Advertising, Inc., a sizeable Fresno agency which Ostlund proposes to retain even if awarded this FM permit. *Id.*, para. 87. *Citing, e.g., Blancett Broadcasting*, 17 FCC 2d 227 (Rev. Bd. 1969), and more recent cases such as *Leininger-Geddes Partnership*, 2 FCC Rcd 3199 (Rev. Bd. 1987) (subsequent history omitted), the exceptors submit that Ostlund has not adequately demonstrated how he can effectuate his full-time integration pledge while maintaining his substantial proprietory interest in his advertising agency, a business generally considered to be based heavily on creativity, initiative and personal reputation.

18. While we tend to sympathize with the exceptors, and would not ourselves have easily awarded Ostlund full-time integration credit on his meager showing to entrust his entire Jeffrey/Scott enterprise to various employees,[17] the matter is ultimately non-decisional.[18] Simply stated, even if Ostlund's integration credit were affirmed in full, he could not overcome Norman's gender preference (perforce when conjoined with her of equivalent local residence). *See generally Jerome Thomas Lamprecht*, 3 FCC Rcd 2527 (1988).[19] Consequently, we need not rule formally on the exceptions to Ostlund's quantitative integration credit, although as we have signaled the ALJ's grant strikes us as generous to a fault and at least facially at odds with a solid line of cases going back to *Blancett*.

VALLEY RADIO LTD.

19. Valley, a limited partnership in which William B. Roth (15% equity) is the sole general partner, seeks a 15% integration credit for his promises to relocate his residence to Fresno and to manage Valley's proposed station. *I.D.*, paras. 93-95. Roth himself carries an extensive broadcast record going back to 1967. *See id.*, para. 97.

20. Under the Commission's standard licensing priorities, Valley must be ranked far behind Norman (though it might conceivably outrank Ostlund were he to be denied all management integration credit). Inasmuch as we have rejected the exceptions directed against Norman's 100% integration credit, Valley cannot overcome her comparative superiority, using traditional FCC standards.

CONCLUSION

21. Having previously rejected Fresno FM as (in the words of one exceptor) "a garden variety sham" (of the more unsavory breed quite accurately described to the court in the Commission's December 28, 1990 brief in *Marin TV Services Partners, LTD v. FCC*, No. 90-1249 (D.C. Cir.)), [20] and having reviewed the original exceptions as well as the rather helpful supplemental briefs, Laura H. Norman emerges as that applicant best qualified by the Commission's current comparative prescripts.

22. ACCORDINGLY, IT IS ORDERED, That the applications of Fresno FM Limited Partnership (File No. BPH-861230MB), John Marshall Hooker d/b/a JMH Broadcasting, as amended (File No. BPH-861230ME), John Edward Ostlund (File No. BPH-861231MD), and Valley Radio Ltd., A California Limited Partnership (File No. BPH-861231ME) ARE DENIED; and

23. IT IS FURTHER ORDERED, That the application of Laura H. Norman for a construction permit for a new FM station at Fresno, California IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] *See Memorandum Opinion and Order*, FCC 90M-2847 (ALJ, released August 13, 1990).

[2] The Board has been delayed in its resolution of this case by virtue of the filing by Fresno FM of an impermissible Application for Review of our June 19, 1990 *MO&O* remanding this proceeding. When the Commission, last December 5, rejected that improper appeal in *Fresno FM Limited Partnership*, 5 FCC Rcd 7261 (1990), the Board once again took up the case for decision.

[3] John Marshall Hooker (now deceased, *see infra* note 13) was the 90% principal of HBC Broadcasters, Inc., and the only HBC principal said to be responsible for the operations of KEAP(AM). HBC sold KEAP in 1989. *See* JMH Petition For Leave to Amend, filed January 25, 1990, a petition we grant for informational purposes only pursuant to 47 CFR § 1.65.

[4] While the ownership composition of these two time brokerage entities fluctuated over time, *see I.D.*, paras. 49-51, it seems effectively uncontroverted that these entities were controlled by non - U.S. citizens during at least a substantial portion of the relevant time period.

[5] The ALJ also added, and found against JMH, a collateral lack of candor issue tied to the underlying control issue(s), to which adverse determination JMH also excepts.

[6] There is also testimony on the record that San Joaquin principals advised the principal of a now-dismissed applicant that more than $200,000 had been paid-in toward their prospective purchase of KEAP. *See I.D.*, para. 80.

[7] HBC Exceptions at 9.

[8] *Id.*, at 11.

[9] *Id.*

[10] *Id.*, at 13.

[11] JMH maintains (Exceptions at 11) that Hooker's failure to monitor on a regular basis the foreign language programming that characterized KEAP was sanctioned by a policy change iterated in *Elimination of Unnecessary Broadcast Regulation*, 54 RR 2d 1043, 1053-1054 (1983). We disagree. There, in tracking the earlier change in regulatory attitude reflected in its 1980 *Time Brokerage Arrangements*, the Commission did afford licensees greater "flexibility" in exercising its responsibilities but it nonetheless stressed that:

> Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public . . . . *This duty is personal to the licensee and may not be delegated.* He is obligated to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast matter for transmission through his facilities so as to assure the discharge of his duty to provide an acceptable program schedule consonant with operating in the public interest in his community.

54 RR 2d at 1054 (footnote and internal citation omitted; emphasis added). The record in the case at bar renders almost irrelevant the Spanish-language aspect of KEAP's programming; Hooker clearly would have lacked responsibility for, and control over, the station's output even had the programming been in English. As the Commission explained in *Elimination of Unnecessary Broadcast Regulation*, its relaxation of prior monitoring requirements left "foreign language broadcasts in the same posture as all others - no more, or less," *id.*, at 1053, and Hooker's complete delegation of oversight over KEAP programming to a non-employee "friend," with whom he sporadically and informally discussed KEAP programming, was the antithesis of the *"positive responsibility"* called for by the very 1983 deregulatory measure upon which JMH defends.

[12] *Cf. Continental Broadcasting Company*, 15 FCC 2d 120, 127 (1968), *petition for recon. denied*, 17 FCC 2d 485 (1969), *aff'd sub nom. Continental Broadcasting, Inc. v. FCC*, 439 F.2d 580 (D.C. Cir.), *cert. denied*, 403 U.S. 905 (1971), where the Commission spoke at length about the responsibility of broadcast licensees to supervise the operation of a station. It concluded:

> It is not enough that a licensee should issue instructions, detect infractions, make occasional visits and engage in endless correctional correspondence with its station manager.

Here, Hooker evinced no dominion at all over San Joaquin employees, and did little (or *nothing*) to assure their compliance with FCC rules and policies.

[13] Shortly after our prior remand, JMH advised the Board that John Marshall Hooker died, and it now seeks to substitute as sole proprietor his daughter Jonna. JMH Petition for Leave To Amend, filed October 11, 1990. We accept this JMH filing solely for information purposes under Section 1.65 of the rules, but find it has no impact on our conclusion that JMH is unqualified for licenseeship, since Hooker's successor-in-interest stands purely in his stead as to basic qualifications. *See, e.g., Rose Broadcasting Co.*, 68 FCC 2d 1242, 1248-1252 (1978) (death of applicant principal does not negate basic (or comparative) issues).

[14] Because we affirm the ALJ on the basic *de facto* control issue, and agree that the evidence thereunder confirms that JMH is unqualified for future licenseeship, we need not and do not address the JMH exceptions to the subsidiary conclusions as to alien control, lack of candor, past broadcast record, or "daytimer preference." We find these, under the circumstances, entirely non-decisional.

[15] Norman also claimed some slight civic activities and minor broadcast experience, *see I.D.*, paras. 103-104, and we do not disagree with the ALJ's conclusion that not very much relative comparative credit is to be derived from her record in these respects, *see id.*, at para. 131.

[16] One of those exceptors was Carta Corp., no longer an active applicant.

[17] As we recently expressed in *Naguabo Broadcasting Co.*, FCC 91R-10, released February 19, 1991 (at n.63):

> The Board's routine practice is to find that generalized promises to "diminish" the time spent on a significant business interest is insufficient. *Leininger-Geddes Partnership*, 2 FCC Rcd 3199 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1181 (1988); *Ft. Collins Telecasters*, 103 FCC 2d 978, 985-86 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1780 (1987). In that regard, a blanket pledge to hire more employees and diminish hours spent is not enough; we have no way to check afterwards, and were we to accept such a promise where significant business interests remain, all comers would receive full-time credit.

We would perceive no reason to depart here from that firm line of precedent.

[18] As is the rumbling over whether Ostlund's advertising agency impacts in any appreciable manner on our primary comparative criterion of media diversification.

[19] That decision, and the gender preference supporting it, is under frontal attack in the District of Columbia Circuit (*Lamprecht v. FCC*, No. 88-1395). We, of course, are bound by *Lamprecht*.

[20] In light of Fresno FM's low estate, we dismiss as moot Ostlund's Petition To Enlarge Issues, filed December 21, 1989, a petition we discussed in our 1990 remand order. But for our disposal of Fresno FM's application, we would have granted that petition. *See Carta Corp, supra*, 5 FCC Rcd at 3705 n.13.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 19, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PETITIONS FOR WAIVER FILED BY ALLTEL AND ILLINOIS CONSOLIDATED OF COMMISSION'S EQUAL ACCESS IMPLEMENTATION REQUIREMENTS FOR INDEPENDENT TELEPHONE COMPANIES

Recently, the Commission received two separate petitions for waiver of the equal access implementation requirements for independent telephone companies. Because the two petitions are similar, and for administrative ease, this public notice establishes one pleading cycle for the two petitions.

On February 21, 1991, Illinois Consolidated Telephone Company (Illinois) filed a petition for waiver of the Commission's equal access rules. Illinois requests an additional six months to complete equal access conversion for one of its end offices in Mt. Auburn, Illinois. Illinois states that on March 15, 1988, it received a letter from MCI Telecommunications Corporation (MCI) requesting that Illinois convert its end offices to equal access. Pursuant to Commission order, Illinois is required to complete the equal access conversion of end offices equipped with stored program controlled (SPC) switches within three years of the request date. *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, (Report and Order), 100 FCC 2d 860 (1985). The three-year time period will end March 15, 1991. Illinois seeks an additional six months, until September 15, 1991, to complete its equal access conversion. Illinois states that on January 19, 1991, it started implementing equal access. Illinois states that during the implementation process, it discovered that the software in the Mt. Auburn exchange switch was not compatible with the Feature Group D requirements. Illinois states that it has ordered new software, but the software manufacturer has not notified Illinois of a specific delivery date. Illinois anticipates that equal access conversion for the Mt. Auburn exchange should be completed by September 15, 1991. Illinois adds that this delay will not affect the equal access conversion of its remaining end offices. Illinois also states that it notified the interexchange carriers of the delay, and they have no difficulties with delaying the conversion.

On February 25, 1991, ALLTEL Indiana, Inc., ALLTEL Illinois, Inc., ALLTEL Michigan, Inc., ALLTEL Ohio, Inc., and Western Reserve Telephone Co. (ALLTEL) filed a petition for temporary waiver of the Commission's equal access rules for twenty-three end offices. ALLTEL states that on March 15, 1988, it received a letter from MCI requesting that ALLTEL convert its end offices to equal access. Under the Commission's requirements, ALLTEL is required to complete the equal access conversion of end offices equipped with SPC switches by March 15, 1991. ALLTEL states that, for various reasons, it requires additional time -- one month to four and one-half years -- to complete the equal access conversions in twenty-three offices. ALLTEL adds that in 1986 it began to convert its offices to equal access and it has completed the conversion in 190 offices.

In its petition, ALLTEL describes its reasons for requesting temporary waivers and includes a schedule of proposed conversion dates for the twenty-three offices. ALLTEL states that it seeks short extensions of time (one to seven months) for seventeen offices, because of "scheduling constraints." ALLTEL seeks longer waivers for longer periods (up to four and one-half years) for the remaining six end offices. ALLTEL states that the switches in two offices are not capable of providing equal access because they are no longer supported by the manufacturer, but that these switches are scheduled for replacement in 1993 and 1994. In three other offices, the switches have been scheduled for replacement in 1994 and 1995. ALLTEL adds that in the remaining office it has scheduled the equal access conversion to coincide with the completion of an upgrade program to increase the number of participants in the equal access offering. ALLTEL states that MCI has agreed to the new dates.

Interested parties should file comments on the petitions by **April 2, 1991,** and reply comments by **April 12, 1991,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20037. Copies of the petitions can be obtained from Downtown Copy Center at (202) 452-1422.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMSAT GENERAL CORPORATION — File No. CSG-90-048-ML

Application for authority to modify its Southbury, Connecticut 11.0-meter earth station facility to add additional frequencies to operate with the INMARSAT system.

COMSAT GENERAL CORPORATION — File No. CSG-90-049-ML

Application for authority to modify its Southbury, Connecticut 11.0-meter earth station facility for operations with the INMARSAT MCS package on the INTELSAT V (F-6) satellite.

COMSAT GENERAL CORPORATION — File No. CSG-90-062-P/L(A)

Application for authority to construct and operate a 14.2-meter antenna at Southbury, Connecticut to provide Tracking, Telemetry and Command and Communications Systems Monitoring for the INMARSAT system.

COMSAT GENERAL CORPORATION — File No. CSG-90-065-ML

Application for authority to modify its Southbury, Connecticut 12.8-meter full performance station antenna (WB-36) to add additional frequencies to operate with the INMARSAT system.

COMMUNICATIONS SATELLITE CORPORATION — File No. CSG-90-066-ML

Application for authority to modify its Southbury, Connecticut 12.8-meter ground earth station (WA-28) to add additional frequencies to operate with the INMARSAT system.

COMSAT GENERAL CORPORATION — File No. CSG-90-069-ML

Application for authority to modify its Santa Paula, California 12.8-meter full performance earth station (KB-34) to add additional frequencies for communications and for the provision of Tracking, Telemetry and Command and Communications Systems Monitoring for the INMARSAT system.

COMMUNICATIONS SATELLITE CORPORATION — File No. CSG-90-070-ML

Application for authority to modify its Santa Paula, California 12.8-meter ground earth station (KA-31) to add additional frequencies to operate with the INMARSAT system.

COMMUNICATIONS SATELLITE CORPORATION — File No. CSG-90-074-P/L

Application for authority to construct and operate a 2.2-meter L-band earth station antenna at its Southbury, Connecticut ground earth complex for the INMARSAT system.

ORDER AND AUTHORIZATION

Adopted: February 20, 1991; Released: March 19, 1991

By the Chief, International Facilities Division:

1. The above-captioned applications filed by the Communications Satellite Corporation World Systems Division (Comsat WSD) and Comsat General Corporation (Comsat General), respectively, request authority pursuant to Section 504(c) of the International Maritime Satellite Telecommunications Act and Title III of the Communications Act of 1934, as amended, to construct or modify and operate earth station facilities at the Southbury, Connecticut and Santa Paula, California communication-satellite earth station complexes for the provision of maritime and aeronautical[1] services via the INMARSAT First and Second Generation satellite system. The applications were placed on public notice on May 9 and 30, June 6, 13 and 27, 1990. Comments were filed by Satellite CD Radio, Inc. (SCD), on June 29, 1990, with respect to those applications requesting INMARSAT Third Generation Satellite L-band frequencies which were below 1530 MHz. Comsat WSD and Comsat General filed amendments to their applications on April 17 and June 28, 1990, which deleted all frequencies pertaining to INMARSAT Third Generation Satellites. These amendments were placed on

public notice on July 20, 1990. SCD withdrew its comments on July 10, 1990. Comsat WSD and Comsat General filed additional amendments to their applications on October 18, 1990 and February 11, 1991.

2. All of the captioned applications request authority for earth station facilities at the Southbury, Connecticut or Santa Paula, California communication-satellite earth station complexes to be used in conjunction with the INMARSAT Second Generation satellite system and, in some cases, First Generation satellite systems[2] in the Atlantic Ocean Region (AOR) and the Pacific Ocean Region (POR), respectively. INMARSAT has divided the AOR into two regions, the AOR-East and the Fourth Ocean Region (AOR-West). Two of the applications are for new antennas and the others are for modifications of existing earth stations to add C-band feeder link and L-band frequencies, add emissions, change powers, change or add new low noise amplifiers (LNAs) and high power amplifiers (HPAs) and diplexers and other equipment to allow communications with INMARSAT Second Generation satellites. The following is a summary of the applications:

a) CSG-90-048-ML filed by Comsat General to modify its 11.0-meter earth station facility authorized under CSG-89-003-P/L to change the HPA configuration and associated equipment to add 6425-6443 MHz uplink and 3600-3623 Mhz downlink C-band feeder link frequencies to provide Armed Forces Radio and Television Service (AFRTS) and to attach a 1.5-meter Bifarian Helix antenna behind the C-band subreflector to add 1626.5-1649.5 MHz transmitting and 1530-1548 MHz receiving L-band frequencies to provide a back-up L-band pilot for Comsat WSD's AOR-East service;

b) CSG-90-049-ML filed by Comsat General to modify its 11.0-meter earth station facility authorized under CSG-89-003-P/L to add the MCS package on the INTELSAT V (F-6) satellite as a point of communication to provide AFRTS, modify the antenna feed, and replace the diplexer to provide improved polarization performance;

c) CSG-90-062-P/L(A) filed by Comsat General to construct a new 14.2-meter antenna with a combined 4-port C-band and L-band feed and diplexer at Southbury, Connecticut, to provide Tracking, Telemetry and Command (TT&C) service on the frequency bands: 6170-6180 MHz and 6416-6418 MHz; and Communications System Monitoring (CSM) service on the frequency bands: 6425-6443 MHz, 3600-3623 MHz, 1626.5-1649.5 MHz and 1530-1548 MHz (the latter two frequency bands will be only for occasional testing of the L-to-C INMARSAT satellite transponder); for use by Comsat WSD in conjunction with INMARSAT's Second Generation operational and spare satellites in the AOR during their relocation and drift orbit/on-station operational lifetime and for routine satellite and ground earth station testing;

d) CSG-90-065-ML filed by Comsat General to modify its 12.8-meter full performance earth station (WB-36) to also operate on the 6425-6443 MHz and 3600-3623 MHz feeder link frequencies and the mobile communications frequency bands 1626.5-1649.5 MHz[3] and 1530-1548 MHz[4] consistent with operations of INMARSAT Second Generation satellites. The facility will be leased to Comsat WSD for use in providing INMARSAT communications services via the new frequencies. The modifications include: changes in emissions, points of communication and power levels, replacement of C-band and addition of L-band LNAs, modification of the feed to the antenna, addition of C-band HPAs and an L-band diplexer to operate with the AOR-West INMARSAT satellites, and addition of new frequency translator equipment;

e) CSG-90-066-ML filed by Comsat WSD to modify its 12.8-meter ground earth station (WA-28) at Southbury, Connecticut, to operate on the 6425-6443 MHz and 3600-3623 MHz feeder link frequencies and the mobile communications frequency bands 1626.5-1649.5 MHz[5] and 1530-1548 MHz[6] consistent with operations of INMARSAT Second Generation satellites. The modifications include: changes in emissions, points of communication and power levels, replacement of C-band and addition of L-band LNAs, removing one existing C-band HPA and adding three additional HPA's, modification of the up and down converters and automatic frequency control (AFC) subsystems, rewiring of the IF jackfield and installation of 70/90 MHz translators, addition of an L-band antenna diplexer, and replacement of the existing C-band HPA input and output switching plates and associated equipment;

f) CSG-90-069-ML filed by Comsat General to modify its 12.8-meter full performance earth station at Santa Paula, California, (KB-34) to operate on the 6425-6443 MHz and 3600-3623 MHz feeder link frequencies and the mobile communications frequency bands 1626.5-1649.5 MHz and 1530-1548 MHz and to provide INMARSAT TT&C services on the frequency bands: 6170-6180 MHz, and 6416-6418 MHz; and CSM on the frequency bands: 6425-6443 MHz, 3600-3623 MHz, 1626.5-1649.5 MHz[7] and 1530-1548 MHz[8]; for use by Comsat WSD to provide its authorized INMARSAT services in conjunction with the INMARSAT Second Generation satellites in the POR and to provide backup TT&C service for the AOR-West. The modifications include: changes in emissions, points of communication and power levels, replacement of C-band and addition of L-band LNAs, addition of C-band and L-band HPAs, replacement of the C-band and addition of an L-band diplexer and addition of new frequency translator, IF and baseband equipment;

g) CSG-90-070-ML filed by Comsat WSD to modify its 12.8-meter ground earth station (KA-31) at Santa Paula, California, to operate on the 6425-6443 MHz and 3600-3623 MHz feeder link frequencies and the 1626.5-1649.5 MHz[9] and 1530-1548 MHz[10] mobile communications frequencies consistent with operations of INMARSAT Second Generation satellites. The modifications include: changes in emissions, points of communication and power levels, replacement of C-band and addition of L-band LNAs, retuning of existing C-band HPAs, modification of the up and down converters and AFC subsystems,

rewiring of the IF jackfield and installation of 70/90 MHz translators, and replacement of the existing C-band HPA input and output switching plates; and

h) CSG-90-074-P/L filed by Comsat WSD to construct and operate a new 2.2-meter L-band earth station at its Southbury, Connecticut communication-satellite ground earth station complex to operate on the 1626.5-1649.5 MHz and 1530-1548 MHz frequency bands to support the services of the Fourth Ocean Region INMARSAT Standard-A Network Coordination Station (NCS) consisting of the following functions: transmission of the L-to-C AFC pilot, transmission and reception of L-band communications carriers for test purposes, reception of the common TDM signalling channel, reception of the AOR-West ground earth station TDM carrier and monitoring of its signalling channel, and L-to-C voice orderwire transmission.

3. Both Comsat WSD and Comsat General have the legal, technical and financial qualifications to construct, modify and operate the proposed facilities. The necessary frequency coordinations with FCC authorized terrestrial users and with the National Telecommunication & Information Agency have been completed. Upon consideration of the applications, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

4. Accordingly, IT IS ORDERED that the applications of Comsat WSD and Comsat General, File Nos. CSG-90-048-ML, CSG-90-049-ML, CSG-90-062-P/L(A), CSG-90-065-ML, CSG-90-066-ML, CSG-90-069-ML, CSG-90-070-ML and CSG-90-074-P/L ARE GRANTED, and

a. Comsat WSD is authorized to:

i. modify its Southbury, Connecticut (WA-28) ground earth station to operate on the 6425-6443 MHz and 3600-3623 MHz feeder link frequencies and the 1626.5-1649.5 MHz and 1530-1548 MHz mobile communications frequencies consistent with operation of INMARSAT's Second Generation satellites;

ii. modify its Santa Paula, California (KA-31) ground earth station to operate on the 6425-6443 MHz and 3600-3623 MHz feeder link frequencies and the 1626.5-1649.5 MHz and 1530-1548 MHz mobile communications frequencies consistent with operation of INMARSAT's Second Generation satellites;

iii. construct and operate a 2.2 meter L-band antenna at its Southbury, Connecticut communications-satellite ground earth station complex to operate on the 1626.5-1649.5 MHz and 1530-1548 MHz frequency bands for the provision of Fourth Ocean Region Standard A services via the INMARSAT system; and

b. Comsat General is authorized to:

i. construct and operate a 14.2-meter earth station at its Southbury, Connecticut communications-satellite earth station complex to provide Tracking, Telemetry and Command services on the 6170-6180 MHz and 6416-6418 MHz frequency bands, and Communications Systems Monitoring services on the 6425-6443 MHz, 3600-3623 MHz, 1626.5-1649.5 MHz and 1530-1548 MHz frequency bands for use by Comsat WSD in conjunction with INMARSAT's Second Generation satellites in the AOR;

ii. modify its Southbury, Connecticut 12.8-meter full performance earth station (WB-36) to operate on the 6425-6443 MHz and 3600-3623 MHz feeder link frequencies and the 1626.5-1649.5 MHz and 1530-1548 MHz mobile communications frequencies operating with INMARSAT's Second Generation satellites in the AOR-West for use by Comsat WSD;

iii. modify its Santa Paula, California 12.8-meter full performance earth station (KB-34) to provide TT&C service on the frequency bands: 6170-6180 MHz and 6416-6418 MHz; and CSM service on the frequency bands: 6425-6443 MHz, 3600-3623 MHz, 1626.5-1649.5 MHz and 1530-1548 MHz; for use by Comsat WSD to provide INMARSAT service in conjunction with the INMARSAT Second Generation satellites in the POR, and provide backup TT&C service for the INMARSAT Fourth Ocean Region (AOR-West); and

iv. modify its authorization under CSG-89-003-P/L to add 6425-6443 MHz uplink and 3600-3623 MHz downlink C-band feeder link frequencies to provide AFRTS, add 1626.5-1649.5 MHz transmitting and 1530-1548 MHz receiving L-band frequencies to provide a back-up L-band pilot for Comsat WSD's AOR-East service, and add the MCS package on the INTELSAT V (F-6) satellite as a point of communication to provide AFRTS and replace the diplexer to provide improved polarization performance.

5. All terms and conditions of previous orders concerning the facilities to be modified remain the same.

6. Upon completion of construction, the applicants shall file with the Commission a summary of equipment which was actually installed.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In Docket 87-75, the Commission granted authority for Comsat to act as U.S. signatory to INMARSAT and to provide international aeronautical mobile-satellite services in the United States, 4 FCC Rcd 6072 (1989).

[2] In ISP-90-001, the Commission waived Section 2.106 of the rules to allow aeronautical mobile-satellite service to be provided on an interim basis using First Generation space segment, 5 FCC Rcd 4117 (1990).

[3] Transmissions in the 1626.5-1649.5 MHz band will be limited to those times when the earth station is actively restoring service normally carried by one of the Southbury communications antennas. The communications signals will be an automatic frequency compensation pilot, an orderwire signal, and occasional test transmissions from co-located test mobile earth stations.

[4] Signals received in the 1530-1548 MHz band will be associated with operations of the communications system. The communications signals will be an automatic frequency compensation pilot, network coordinations signals, Southbury's own C-to-L band signalling/data channels, and an occasional test transmisssion to a co-located test mobile earth station.

[5] *See* note 3, *supra*.

[6] *See* note 4, *supra*.

[7] *See* note 3, *supra*.

[8] *See* note 4, *supra*.

[9] *See* note 3, *supra*.

[10] *See* note 4, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. I-T-D-91-004

Application for authority to close Public Coast Station WCT, San Juan, Puerto Rico.

ORDER AND AUTHORIZATION

Adopted: March 8, 1991; Released: March 19, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed by American Telephone and Telegraph Co. (AT&T) requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue the provision of coastal and harbor radio telephone service from Public Coast Station WCT located at 901 Ponce de Leon Avenue, San Juan, Puerto Rico. The station serves the San Juan, Puerto Rico area. The application was placed on public notice on December 19, 1990. No comments were received.

2. The basic statutory test to be applied by this Commission in considering applications for discontinuance of common carrier services to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected" by the proposed action. Application of this standard presents the Commission with a task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

3. In support of its application, AT&T states that no messages were made through the subject station subsequent to February 27, 1986, resulting in a loss of all revenues. According to AT&T, users of the station have available to them the cellular service of Puerto Rico Telephone Co. AT&T states that distress calls rendering aid to vessels are handled by the U.S. Coast Guard Station NMR.

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance of service via Station WCT.

5. Accordingly, IT IS ORDERED that application File No. I-T-D-91-004 IS GRANTED, and AT&T is authorized to discontinue service via its Public Coast Station WCT, San Juan, Puerto Rico.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] *Public Coast Radiotelegraph Stations*, 67 FCC 2d 790 at 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. I-T-C-91-035

Application for authority to acquire and operate 303 Digital Circuit Multiplication System Terminals for service between the U.S. and various overseas points.

ORDER AND AUTHORIZATION

Adopted: March 8, 1991; Released: March 19, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed by American Telephone & Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate 303 Digital Circuit Multiplication System (DCMS) Terminals to derive additional cable and satellite circuits for the provision of AT&T's authorized services between the U.S. and various overseas points. The application was placed on public notice on December 5, 1990. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-035 IS GRANTED, and AT&T is authorized to:

a. acquire and operate 303 DCMS terminals; and

b. use these terminals to derive additional cable and satellite circuits for the provision of AT&T's regularly authorized services between the U.S. and the points listed in the attached Appendix.

3. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

Countries for which Additional DCMS Authority is Requested and Totals by Bearer Facility

American Samoa
Argentina
Aruba
Australia
Austria
Bahamas
Bahrain
Barbados
Belgium
Bermuda
Bolivia
Brazil
British Virgin Islands
Brunei
Bulgaria
Cape Verde
Cayman Islands
Chile
China
Costa Rica
Curacao
Cyprus
Czechoslovakia
Denmark
Dominica
Dominican Republic
Ecuador
Egypt
El Salvador
Fiji Islands
Finland
France
Germany
Greece
Guam
Guatemala
Guyana
Haiti
Honduras
Hong Kong
Hungary
Iceland
India
Indonesia
Iran
Ireland
Israel
Italy
Jamaica
Japan
Jordan
Korea
Malaysia
Malta
Marshall Islands
Micronesia
Montserrat
Netherlands
Netherlands Antilles
New Caledonia
New Zealand
Nicaragua
Nigeria
Norway
Pakistan
Panama
Papua New Guinea
Philippines
Poland
Portugal
St. Lucia
Saipan
Saudi Arabia
Singapore
South Africa
Spain
Sweden
Switzerland
Tahiti
Taiwan
Thailand
Tonga
Tortola
Trinidad
Turkey
Turks & Caicos
United Arab Emirates
United Kingdom
U.S.S.R.
Venezuela
Western Samoa
Yugoslavia

TOTALS

IDR/ TDMA	TAT-8	HAW-4/ TPC-3	TCS-1	PTAT	TAT-9	Total
181	53	16	18	13	22	303

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION — File No. I-T-C-91-043

Application for authority to acquire and operate facilities for direct service between the U.S. and China.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 8, 1991; Released: March 19, 1991

By the Chief, International Facilities Division:

1. The above-captioned application by MCI Telecommunications Corp. (MCI) requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for direct service between the U.S. and China. The application was placed on public notice on January 9, 1991. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and convenience and necessity require the provision of direct service between the U.S. and China by MCI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-043 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 24 voice-grade satellite half-circuits between the Yacolt, Washington earth station and an appropriate satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in China furnished by MCI's correspondent in China;

b. own and operate 24 voice-grade circuits in the Yacolt, Washington earth station;

c. own and operate 24 voice-grade connecting circuits between the Yacolt earth station and MCI's operating center in Dominguez Hills, California; and

d. use said facilities to provide MCI's regularly authorized services, including switched voice service, between the U.S. and China and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in China. A copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

WILLIAM E. NORTHFIELD — File No. 05229-CL-MP-90

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market No. 483, Minnesota 2 - Lake of the Woods Rural Service Area (RSA), for station KNKN451

MEMORANDUM OPINION AND ORDER

Adopted: March 12, 1991; Released: March 19, 1991

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. William E. Northfield (Northfield) filed the captioned application to add a new cell to his non-wireline cellular system in the Minnesota 2 - Lake of the Woods Rural Service Area (RSA). The proposed cell's 39 dBu contour would extend beyond the boundary of the Minnesota 2 RSA and into the adjacent Minnesota 6 - Hubbard RSA. Heartland Cellular Partnership (Heartland), the wireline tentative selectee for the Minnesota 6 RSA, filed a petition to deny.[1] Northfield filed a response. For the reasons set forth below, we grant Heartland's petition and dismiss the captioned application.

II. DISCUSSION

2. Heartland argues that the application should be dismissed because the proposed 39 dBu contour extension is not *de minimis*. Heartland contends that the extension, covering over 200 square miles and amounting to 32.4 percent of the cell, is too large to be considered *de minimis*. Heartland further states that the extension area includes approximately 13 miles of U.S. Highway 2 and approximately 10 miles of U.S. Highway 71, is a popular vacation and tourist location and has a population density above average for this region of Minnesota. Finally, Heartland states that the RSA boundary is straight, and that Northfield has failed to use a directional antenna which would prevent or minimize the extension.

3. Northfield argues that the extension should be allowed, despite its relatively large size, because cellular service is not currently being provided in the extension area.[2] Northfield contends that Heartland is not serving this area and is not likely to in the near future, as Heartland's present coverage is more than 100 miles away. Northfield further argues that the extension is *de minimis* because it covers only 1.93 percent of the Minnesota 6 RSA and that the cell's principal purpose is to improve service within Northfield's Minnesota 2 RSA.

4. In *Procedures Update*, 52 RR 2d 725 (1982), *aff'd. Cellular Radio Service*, 56 RR 2d 1583 (1984), and in Section 22.903(a) of the rules, [3] the Commission established guidelines for configuring 39 dBu contours. The Commission stated that 39 dBu contours should be contained entirely within the MSA or NECMA, but that a *de minimis* extension beyond the CGSA would not render an application defective if the application included "a specific explanation of why it was necessary to engineer the particular cell(s) such that the 39 dBu contours could not be kept entirely within the SMSA (or NECMA)."[4] In evaluating proposed extensions, we take a variety of factors into account, such as the terrain and population of the area in question, the shape of adjoining boundaries and any extenuating engineering problems. In analyzing the application, we look first to see if the extension is minor, and then we evaluate the engineering explanation. *See, e.g., Saco River Cellular Telephone Company*, 2 FCC Rcd 2009 (Mob. Serv. Div. 1987); *Metroplex Telephone Company*, 2 FCC Rcd 7301 (Mob. Serv. Div. 1987); *GTE Mobilnet of South Texas Limited Partnership*, 4 FCC Rcd 1657 (Mob. Serv. Div. 1989).

5. We find that the extension proposed here is more than *de minimis*. A 32.4 percent cell extension is much larger than the Commission has previously allowed.[5] Furthermore, Northfield has not explained why such an extension is necessary. The RSA boundary is perfectly straight, there appear to be no unusual terrain conditions and Northfield has used an omnidirectional rather than a directional antenna. In addition, the extension area may be a significant source of revenue for the cellular licensees in Minnesota 6. The area covers two major highways and has a population density greater than average for this region. The fact that only 1.93 percent of the Minnesota 6 RSA is covered is not sufficient to render the extension *de minimis* in light of these factors. Finally, the lack of cellular service in the extension area does not justify granting Northfield's application.[6] One of the purposes of the *de minimis* standard is to protect the markets of neighboring cellular licensees until such licensees have had an an opportunity to develop their systems.[7]

6. Based on the foregoing considerations, we conclude that the proposed extension is not *de minimis* and thus fails to meet the requirements of Section 22.903(a) of the rules. *See also Procedures Update*, 52 RR 2d at 725. The application is therefore dismissed as defective pursuant to Section 22.20 of the rules.

III. ORDERING PARAGRAPHS

7. Accordingly, IT IS ORDERED that the Petition to deny filed by Heartland Cellular Partnership IS GRANTED.

8. IT IS FURTHER ORDERED that the application of William E. Northfield, File No. 05229-CL-MP-90, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Heartland has since received the wireline construction permit for the Minnesota 6 RSA. Heartland has an interest in any potential customers in the extension area, and thus has standing to file a petition against Northfield's non-wireline application.

[2] Northfield cites *Advanced Mobile Phone Service, Inc. (Kansas City)*, 54 RR 2d 531, 534-35 (Com. Car. Bur. 1983), which allowed a 21 percent cell extension, covering 92 square miles, where the extension area was unlikely to be served by another licensee.

[3] Section 22.903(a) states in pertinent part:

> The Cellular Geographic Service Area (CGSA) of the cellular system shall be defined by the applicant as the area intended to be served. No CGSA, which includes areas within a Metropolitan Statistical Area (MSA), or in New England, a New England County Metropolitan Area (NECMA), as modified in paragraph (e), of this section, below, may extend beyond the boundaries of the MSA or NECMA, except where any such extensions are *de minimis* and do not include areas within another central MSA or NECMA.

[4] *Procedures Update*, 52 RR 2d at 726.

[5] *See e.g., Alltel Cellular Associates of the Carolinas*, 61 RR 2d 225, 227 & n.10 (Com. Car. Bur. 1986) (cell extensions of 20 percent or more unlikely to be considered *de minimis* and 30.5 percent extension "can in no way be termed *de minimis* under any Commission precedent or policy"); *Chicago SMSA Ltd. Partnership*, 61 RR 2d 58, 61 (Com. Car. Bur. 1986) (27 percent cell extension not *de minimis); Advanced Mobile Phone Service, Inc. (Philadelphia)*, 52 RR 2d 1593, 1602-03 (Com. Car. Bur. 1983) (21 percent, 22 percent and 24 percent cell extensions not *de minimis)*.

[6] Northfield has not proven his claim that service to the extension area is unlikely to be provided by the licensees for Minnesota 6. In fact, Heartland has filed a petition to protect its interest in this area. Furthermore, *Kansas City*, 51 RR 2d at 535, relied on by Northfield, involved one of the top-30 MSA markets which were licensed by comparative hearings. At the time these markets were licensed, service to other areas was many years away and the Commission's primary concern was that no comparative credit be given for extension areas. *Alltel*, 61 RR 2d at 227 n.10. After adopting the more expeditious lottery procedures, the Commission's concern shifted to protecting the service areas of existing and future licensees. *Id.* 727 n.10. *Kansas City* also involved a 21 percent cell extension, covering only 92 square miles, which is much smaller than the extension proposed here.

[7] *See Alltel*, 61 RR 2d at 227 n.10.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 12, 1991

COMMENTS INVITED ON WYOMING REGIONAL PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Wyoming (Region 46).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, parties are hereby given thirty days from the date of Federal Register publication of this public notice to file comments and fifteen days to reply to any comments filed. (*See* Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

In accordance with the Commission's Memorandum Opinion and Order in General Docket No. 87-112, Region 46 consists of the State of Wyoming. General Docket No. 87-112, 3 FCC Rcd 2113 (1988).

Comments should be clearly identified as submissions to *PR Docket 91-59, Wyoming-Region 46* and commenters should send an original and five copies to the Secretary, Federal Communications Commission, Washington, DC 20554.

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of

NEW ENGLAND TELEPHONE
AND TELEGRAPH CO.

NEW YORK TELEPHONE CO.

PACIFIC BELL

SOUTHWESTERN BELL
TELEPHONE COMPANY

Apparent Violations of the
Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: March 12, 1991; Released: March 14, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Allnet Communications Services, Inc. (Allnet) has moved for leave to intervene in the enforcement proceedings that the Commission initiated on November 9, 1990, against New England Telephone and Telegraph Co. (NET), New York Telephone Co. (NYT), Pacific Bell (Pacific), and Southwestern Bell Telephone Company (Southwestern).[1] These local exchange carriers (LECs) filed oppositions, and Allnet replied. In this Order, we grant in part Allnet's motions. We also specify that any comments in these proceedings shall be due 20 days from release of this Order.

II. BACKGROUND

2. The proceedings in which Allnet seeks to intervene arise from adjustments NET, NYT, Pacific, and Southwestern reported to the common line (CL) pool administered by the National Exchange Carrier Association, Inc. (NECA). In Notices *of Apparent Liability for Forfeiture and Orders to Show Cause*, the Commission determined that these LECs had apparently reported erroneous data to NECA in order to increase the CL pool's rate of return for 1988. The Commission informed NET, NYT, Pacific, and Southwestern that they are each apparently liable for a forfeiture of $250,000 for failing to account for the effects of their erroneous reporting in the manner prescribed by the Commission's rules. The *Notices* ordered each of these LECs either to pay that forfeiture amount or to show cause why it should not be imposed or should be reduced.

3. In the *Notices*, the Commission also required NET, NYT, Pacific, and Southwestern to show cause why they should not be required to record the effects of their erroneous reporting in Account 7360, Other nonoperating income. In addition, the *Notices* ordered NET, NYT, and Southwestern to show cause why they should not be required to include revenue that had apparently been omitted from their rate of return reports for 1988 in their next rate of return reports. Finally, to keep Pacific from profiting in any way from manipulating the NECA adjustment process, the Commission ordered Pacific to show cause why it should not be required to withdraw certain adjustments that it had reported to NECA during 1989.

III. PLEADINGS

4. In its motions for leave to intervene, Allnet states that it purchases interstate access from NET, NYT, Pacific, and Southwestern. Allnet contends that it has interests in maintaining the integrity of the NECA pooling processes and in assuring that it pays just, reasonable, and non-discriminatory interstate access charges. Allnet states further that the outcome of the enforcement proceedings will affect its ability to recover past and future unlawful charges.

5. NET, NYT, Pacific, and Southwestern contend that Allnet has not shown any interest justifying intervention in the enforcement proceedings. NET and NYT assert that the proceedings against them concern compliance with accounting rules and possible liability for forfeitures rather than the lawfulness of telephone company rates, and that participation by third parties would be unlikely to aid the Commission's investigations. Pacific argues that Allnet's stated interest in intervening, unlawful charges, is not at issue in the proceeding against Pacific, because the Commission has not asserted that Pacific's actions injured ratepayers or customers, that Pacific engaged in cross-subsidization, or that Pacific's rates were unlawful. Southwestern maintains that Allnet is not and has not been a carrier member of the CL pool, and that the *Southwestern Notice* contains no finding of any change in access tariff rates resulting from the adjustment Southwestern reported to that pool.

6. In reply, Allnet argues that its interests in maintaining the integrity of cost pooling systems and in assuring that it pays just, reasonable, and non-discriminatory rates for access services require that the Commission make it a party to the enforcement proceedings. Allnet contends that the Commission has accused NET, NYT, Pacific, and Southwestern of shifting CL revenues to other access categories. According to Allnet, the Commission's treatment of these revenue shifts will directly affect these LECs' rates of return for CL and for switched access services during the 1987-88 monitoring period. Allnet also states that it appears that the Commission may not require that the revenues be rebooked properly. Allnet states further that it has complaints pending before the Commission that seek refunds from NET, NYT, and Southwestern for alleged overearnings during that period, and, in effect, that the measures the *Notices* proposed to take against these LECs are not sufficient to protect Allnet's interests in connection with those complaints.

IV. DISCUSSION

7. The Commission has no rules governing intervention in enforcement actions such as these, and it is not necessary for interested persons formally to request intervention in order to have their views considered pursuant to Section 1.41 of the Commission's rules.[2] While it is not

clear why Allnet has formally requested intervention rather than simply filing its views, we will nevertheless consider whether we should exercise our discretion to permit it to intervene.

8. As a preliminary matter, we note that intervention is not appropriate with respect to the forfeiture aspect of these proceedings. The degree to which the carriers should be fined is a matter between them and the Commission; outside entities such as Allnet do not have any particularized interest justifying intervention. Under the specific circumstances of this case, we will, however, grant Allnet's motions to intervene with respect to the show cause portions of these proceedings. We believe that Allnet has an interest in the outcome of the order to show cause portions of the proceedings, especially in light of its pending complaints, and its participation may assist the Commission in resolving the issues in question. Any comments that Allnet or any other interested person wishes to file in these proceedings shall be due within 20 days from release of this Order. NET, NYT, Pacific, and Southwestern may file replies within 15 days thereafter.

9. In light of our partial grant of Allnet's motions, these proceedings will, upon release of this Order, be restricted proceedings under the Commission's *ex parte* rules. [3]

V. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), (j), and Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that the Motions for Leave to Intervene filed November 21, 1990, by Allnet Communications Services, Inc., ARE GRANTED IN PART AND DENIED IN PART.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] New England Telephone and Telegraph Co., *Notice of Apparent Liability for Forfeiture and Order to Show Cause*, 5 FCC Rcd 7190 (1990); New York Telephone Co., *Notice of Apparent Liability for Forfeiture and Order to Show Cause*, 5 FCC Rcd 7193 (1990); Pacific Bell, *Notice of Apparent Liability for Forfeiture and Order to Show Cause*, 5 FCC Rcd 7196 (1990); Southwestern Bell Telephone Co., *Notice of Apparent Liability for Forfeiture and Order to Show Cause*, 5 FCC Rcd 7199 (1990).

[2] 47 C.F.R. §1.41; *see New York Telephone Co.*, 5 FCC Rcd 5892, at n.3 (1990), *petitions for reconsideration pending.*

[3] *See* 47 C.F.R. §1.1208.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New York Telephone Company	Transmittal Nos. 1024, 1079
New England Telephone and Telegraph Company	Transmittal Nos. 1035, 1085

Petition for Waiver of Section 69.4(b) of the Commission's Rules

ORDER

Adopted: March 5, 1991; Released: March 5, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. New England Telephone and Telegraph Company (NET) and New York Telephone Company (NYT) (together, NYNEX) seek a waiver of the Commission's Rules in order to provide the operator assistance services of line status verification and call interruption. A waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, is required because the rules do not contain rate elements for these offerings. NYNEX also seeks a waiver to allocate the associated costs of those services to the Transport rate element rather than to the Interexchange category as specified in Part 69 of the Rules. NYNEX also filed tariff transmittals to offer these services, which are scheduled to become effective March 6, 1991. MCI Telecommunications Corporation (MCI) has filed petitions to suspend and investigate NET's tariff transmittals.

II. WAIVER REQUEST

A. NYNEX Petition

2. NYNEX seeks to offer its interexchange carrier (IC) customers the operator services of Busy Line Verification (BLV) and Busy Line Verification and Interrupt (BLV/I). BLV is performed at a customer's request to determine whether a particular line is in use. BLV/I involves the verification of a busy line as well as the interruption of the call by the operator to inform one of the talking parties that another person wishes to contact him or her immediately. NYNEX filed a petition on behalf of NET and NYT requesting a waiver of relevant sections of Part 69 in order to establish a separate Transport rate element to provide these line status services and to allocate the associated costs to that rate subelement.[1] NYNEX explains that this offering is needed because of its agreement with American Telephone and Telegraph Company to assume operator services functions pursuant to the Plan of Reorganization associated with the Bell System divestiture. NYNEX Waiver Petition at 2. No party responded to a Public Notice seeking comments regarding NYNEX's waiver petition.[2]

B. Discussion

3. A grant of NYNEX's waiver request to establish a rate element for its line status services is necessary to allow NYNEX to offer these services as Part 69 does not provide for such a service. Rules may be waived if there is "good cause" to do so. *See* Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969). *See also* Northeast Cellular Telephone Company v. FCC, 897 F.2d 1164 (1990). Line status services clearly are beneficial to consumers. In this instance, strict compliance with the Commission's Part 69 Rules would in fact be inconsistent with the public interest. Thus, we grant NYNEX's request for a waiver of the rules to establish rate elements for line status services. We conclude, however, that these elements must be separate operator services access elements and not subelements of the Transport access element. This approach must be taken in order to be consistent with the Bureau's conclusions and requirements in the *Operator Services Waiver Order*.[3]

4. NYNEX will be required to allocate the associated costs of these services to those same operator services access elements, consistent with that Order. The Bureau has concluded that NYNEX has failed to demonstrate good cause for authorizing the allocation of these costs to the Transport category. Accordingly, we require that NYNEX allocate the costs of its line status services to the access elements created by our waiver for operator services.

III. TARIFF PROPOSAL

5. NET filed Transmittal Nos. 1035 and 1085 and NYT filed Transmittal Nos. 1024 and 1079[4] to establish the rates necessary to recover the costs of providing the line status services.[5] NYT's would establish initial rates for BLV of $0.81 and $1.01 for BLV/I. NET proposes to charge $1.00 per request for BLV and $1.12 per request for BLV/I. MCI filed petitions to suspend and investigate both of NET's transmittals and NYNEX replied to these petitions.[6] No party protested NYT's transmittal.

6. MCI contends that NET assigns costs to these services on the basis of excessive projections of operator work seconds. According to MCI, NET's operator work time exceeds NYT's by nearly 33 percent and NYNEX does not explain this disparity. MCI Tr. 1035 Petition at 4; MCI Tr. 1085 Petition at 2. MCI also doubts the accuracy of NET's projected demand for BLV/I service because it is inconsistent with the demand projections of NYT and Bell Atlantic. MCI Tr. 1035 Petition at 2, 4. MCI requests that the Commission seek an explanation for this discrepancy even though it will not affect rates. *Id.* at 4. Finally, MCI suggests that NET improperly included Local Switching access costs in its rates. *Id.* at 2-3.

7. NYNEX responds that NET's operator work seconds for conducting a busy line verification are significantly higher than NYT's because prior to performing the verification, NET obtains the name of the requesting cus-

tomer and determines if the call is urgent. NYT, on the other hand, waits until the customer requests interruption to perform those queries. NYNEX Tr. 1085 Reply at 5. NYNEX explains that this procedure accounts for the high number of work seconds associated with verification as well as the higher rate. In addition, NYNEX explains that NET's different screening procedures account for the apparent inconsistencies in demand projections for NET and NYT. *Id.* at 4-5. Although NYNEX did not respond to MCI's charges regarding the inclusion of Local Switching costs, Transmittal No. 1085 eliminates those costs from NET's line status charges. Additionally, in Transmittal Nos. 1079 and 1085, NYNEX has revised its rates to reflect Transport rates allowed in the *1990 Access Order*.[7]

8. The Common Carrier Bureau has reviewed NET's Transmittal Nos. 1035 and 1085, as well as the petitions of MCI and NYNEX's replies. We conclude that no question has been presented by the petitioner that warrants suspension and investigation at this time.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that the petitions to suspend and investigate filed against New England Telephone and Telegraph Company Tariff F.C.C. No. 40, Transmittal Nos. 1035 and 1085 by MCI Telecommunications Corp. ARE DENIED.

10. IT IS FURTHER ORDERED that the petition for waiver of Section 69.4(b) of the Commission's Rules, 47 C.F.R. § 69.4(b), filed by NYNEX IS GRANTED to the extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Petition for Waiver, New England Telephone and Telegraph Company and New York Telephone Company, filed Jan. 29, 1990 (NYNEX Waiver Petition).

[2] The NYNEX Telephone Companies File Petition for Waiver of Part 69 To Establish Busy Line Verification and Busy Line Verification and Interrupt Services, Public Notice, 5 FCC Rcd 1066 (Com.Car.Bur. 1990).

[3] Ameritech Petition for Waiver, Memorandum Opinion and Order, DA 91-274, released March 5, 1991 (*Operator Services Waiver Order*).

[4] Transmittal No. 1079 transfers the line status services provisions in NYT's tariff from Section 13, "Additional Engineering," to a new section entitled "Inward Operator Services." In a letter to the Common Carrier Bureau, NYNEX indicates that NET will also relocate its line status services provisions in a separate section of its tariff. Letter from K. Rust, Director, Federal Regulatory Matters, NYNEX, to Chief, Tariff Division, Aug. 24, 1990.

[5] New England Telephone and Telegraph Company, Tariff F.C.C. No. 40, Transmittal No. 1035, filed Jan. 29, 1990; New England Telephone and Telegraph Company, Tariff F.C.C. No. 40, Transmittal No. 1085, filed Aug. 16, 1990; New York Telephone Company, Tariff F.C.C. No. 41, Transmittal No. 1024, filed Jan. 29, 1990; New York Telephone Company, Tariff F.C.C. No. 41, Transmittal No. 1079, filed Aug. 24, 1990.

[6] MCI Petition To Suspend and Investigate, filed Feb. 13, 1990 (MCI Tr. 1035 Petition); MCI Petition To Suspend and Investigate, filed Aug. 22, 1990 (MCI Tr. 1085 Petition). NYNEX filed replies to MCI's petitions on April 30, 1990 (NYNEX Tr. 1035 Reply), and Aug. 29, 1990 (NYNEX Tr. 1085 Reply).

[7] Annual 1990 Access Tariff Filings, Memorandum Opinion and Order, CC Docket No. 90-320, 5 FCC Rcd 4177 (Com.Car.Bur. 1990), *app. for review & petitions for recon. pending.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Contel Telephone Companies — Transmittal No. 61

Petition for Waiver of Section 69.4(b) of the Commission's Rules

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: March 6, 1991; Released: March 7, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On June 22, 1990, Contel Telephone Companies (Contel) filed a petition for waiver of Section 69.4(b) of the Commission's Rules, 47 C.F.R. Sec. 69.4(b), which describes the access service elements established by the Commission, in order to establish separate rate elements for operator services to its interexchange carrier (IC) access customers. The rate elements are designed to recover the interstate allocated operator service costs which are currently assigned to the Interexchange category under Part 69 Rules. Contel Petition at 4. Contel does not seek to reallocate the associated costs to any other Part 69 category, but only to establish new access tariff rate elements to recover the relevant costs. *Id.* at 4.

2. Concurrent with its waiver petition, Contel filed Transmittal No. 61, revising Contel Tariff F.C.C. No. 1, which would implement the requested new rate elements for operator services. Transmittal 61 is scheduled to become effective on March 8, 1991. On July 10, 1990, International Telecharge, Inc. (ITI) filed a pleading captioned "Opposition and Petition To Reject, or, in the Alternative, To Suspend and Investigate," which addresses both Contel's waiver petition and tariff transmittal.[1]

II. BACKGROUND

3. Contel's offering consists of four service elements. The first, Operator Transfer Service (OTS), involves a Contel operator transferring an 0-call to the subscribing IC of the end user's choice. Transmittal 61 Description and Justification (D&J) at 1. The three other elements comprise inward assistance service functions (Busy Line Verification, Call Interrupt, and Operator Assistance) performed at the request of customer operators for interstate traffic. In order to subscribe to Contel's operator services, IC customers must establish Feature Group C (FGC) or Feature Group D (FGD) trunking facilities from their premises to the Contel Operator Service switching locations. These various Contel operator services, and the rate structure for these services, are described in more detail below.

A. Operator Transfer Service

4. Under Contel's tariff, when a caller from an equal access end office seeking to make an interLATA call dials 0- and reaches a Contel operator, the caller will be requested to designate an IC the caller would prefer to use. If that IC subscribes to OTS, the operator would transfer the call to that IC. If the preferred IC is not an OTS subscriber, or the caller has no preference, the operator will ask the caller to select from a list of participating customers. The initial order in which the customers appear on the list will be determined by lottery. The list will be updated monthly, and the order of listing will be on a rotating basis. *Id.* at 4-5. Contel will transfer the calls to the designated customer on a dedicated trunk group which utilizes FGD transmission and signalling characteristics. It is the IC customer's responsibility to then complete the calls. If the 0-call originates from a non-equal access exchange, Contel will continue to transfer the call to AT&T via FGC facilities (if requested by AT&T) until such time as these exchanges have been converted to equal access. At such time, operator services will be provided to any interested customer. *Id.* at 5.

5. Contel will assess a separate charge, applied on a per call transferred basis, to OTS calls in order to recover the relevant interstate costs. In addition, Contel will charge normal premium FGC or FGD charges for OTS calls, *i.e.*, usage sensitive, nonrecurring, and monthly recurring charges. *Id.*

B. Inward Operator Assistance Functions

6. Contel has created three inward operator assistance services available at the request of a customer's operator. *Id.* at 6. Inward operator assistance flat rate charges will be assessed on a per attempt or per request basis, with related transport and switching costs included in the rate development. *Id.* Busy Line Verification is performed at a customer's request to determine whether a particular line is in use, out of order, or ready to accept calls. *Id.* Interrupt service is performed when the Contel operator, at the request of the customer's operator, interrupts a verified busy line and informs the called party that there is a call waiting. *Id.* Finally, Operator Assistance service is performed when a Contel operator provides dialing or call routing assistance to a customer's operator. *Id.*

C. Rate Structure

7. Initially Contel will offer 0-transfer services in only six jurisdictions.[2] Contel seeks to tariff a consolidated rate schedule applicable to all operator services provided by Contel's operating companies in these six jurisdictions. ICs would be charged an individual rate for each service, with the charge applied each time a transfer is made. Contel calculated these rates based on the cost per second of operator service multiplied by the work seconds required for each service. Operator costs used in ratemaking included labor expense (direct and indirect), operator switch and position investment, transport cost, and miscellaneous investments and expenses. *Id.* at 8. Contel will charge $0.35 per call for OTS; $0.50 for Busy Line Verification; $0.70 for Interrupt; and $0.20 for Operator Assistance. *Id.*, Schedule 1.

III. PLEADINGS

8. ITI, in addition to opposing Contel's Part 69 waiver petition, alleges that Contel violated Section 61.38 of the Commission's Rules by failing to provide sufficient cost support. ITI Petition at 2-6; 6-8. Specifically, ITI claims that Contel failed to provide enough data to evaluate Contel's estimates of operator unit costs and operator work seconds. In addition, ITI claims that studies used to develop those estimates, based on study area data in two states, are not representative of the eight states in which Contel would provide the service. *Id.* at 7.

9. Contel replies that the cost support documentation submitted under Transmittal 61 is sufficient to judge the reasonableness of its proposed operator services rates, and that the data provided satisfy the requirements of Section 61.38. Contel Reply at 8. Contel maintains that it clearly demonstrated the calculation of the operator unit cost per work second (which forms the basis of the rate development) in its D&J, and generally explained the method by which it performed the calculations. *Id.* at 9. In addition, Contel contends that the unit costs at operator centers within the two-state study area are typical of such costs, and represent the only readily available data it had at the time of the filing. *Id.* Contel adds that collecting additional cost data would have needlessly delayed the filing. *Id.* Further, Contel notes that its operator service tariff is similar to those that have been established by other local exchange carriers (LECs).[3] *Id.* at 2.

IV. DISCUSSION

10. We find good cause to waive the Part 69 rules to permit Contel to provide all operator services described in this petition, provided that the relevant costs are reallocated to the access elements. This Bureau has granted a blanket Part 69 waiver to any LEC who seeks to provide operator transfer or line status services, subject to two conditions. First, the LEC must create separate operator service access elements for operator transfer and line status services. Second, the LEC must allocate all costs associated with provision of those services to those operator service access elements rather than to the Interexchange category. Ameritech Operating Companies, Petition for Waiver of Section 69.4(b) of the Commission's Rules, Memorandum Opinion and Order, DA No. 91-274, released Mar. 5, 1991 (Com.Car.Bur.), (*Operator Service Waiver Order*).

11. In its request for waiver of Section 69.4(b), Contel states that it calculated the rates associated with the separate operator services rate elements to recover the related interstate allocated operator service costs which are currently assigned to the Interexchange category under the Part 69 Rules. Contel Petition at 4. Contel specifically states that it does not seek to reallocate these costs to any other Part 69 category. *Id.* We interpret this statement to mean that Contel does not plan to change its current method of allocating these costs to the Interexchange category. However, in order to be consistent with the blanket waiver granted in the *Operator Services Waiver Order*, *supra*, Contel must reallocate the associated costs to the new rate elements in accordance with that Order.[4]

12. With respect to Transmittal 61, the Common Carrier Bureau has reviewed that transmittal, the petitioner's assertions, and related Contel submissions.[5] We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to require rejection, and that an investigation is not warranted at this time.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that the petition for waiver filed by Contel Telephone Companies IS GRANTED, IN PART, to the extent indicated herein.

14. IT IS FURTHER ORDERED that the motion to accept a late-filed pleading, filed by International Telecharge, Inc., IS GRANTED.

15. IT IS FURTHER ORDERED that the opposition and petition to reject or suspend and investigate Contel Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 61, filed by International Telecharge, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] ITI's pleading, which was filed one day late, was accompanied by a motion to accept a late-filed pleading. While Contel does not formally oppose ITI's motion, Contel notes in its reply that ITI had sufficient time to review Contel's filing and submit an opposition. Contel Reply at 1 n.1. We believe, however, that ITI demonstrated good cause for its brief delay in filing and, accordingly, grant its motion to accept a late-filed pleading.

[2] Contel originally sought to offer 0- transfer services in Texas. On February 26, 1991, Contel filed its Application No. 30 requesting Special Permission to amend its tariff. Among other things, Contel requested removal of Texas as one of the jurisdictions in which the service would be offered. The Tariff Division granted Contel's request under Special Permission No. 91-168 and Contel filed the revisions under its Transmittal No. 81 on February 28, 1991.

[3] Contel cites the following Orders: Bell Atlantic Telephone Companies, 4 FCC Rcd. 455 (Com.Car.Bur. 1988); New York Telephone Company and New England Telephone Company, 4 FCC Rcd. 1391 (Com.Car.Bur. 1989); Illinois Consolidated Telephone Company, 5 FCC Rcd. 3246 (Com.Car.Bur. 1990); and Southwestern Bell Telephone Companies, 5 FCC Rcd. 3452 (Com.Car.Bur. 1990).

[4] Contel's offering, as structured, already meets the other condition imposed in the *Operator Services Waiver Order* -- that separate access elements for operator transfer and line status services be created.

[5] Contel filed additional cost support data. *See* Letter dated January 21, 1991 from S. Randolph, Access Tariff Administrator, Contel Service Corporation, to J. Scott, Tariff Division, Common Carrier Bureau, FCC.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Telephone Companies — Transmittal No. 351

Tariff F.C.C. No. 4

ORDER

Adopted: March 6, 1991; Released: March 7, 1991

By the Chief, Common Carrier Bureau:

1. On October 19, 1990, the BellSouth Telephone Companies (BellSouth) filed Transmittal No. 351 to establish an Operator Transfer Service (OTS). BellSouth would recover the operator handling costs associated with OTS through the creation of a new Part 69 rate subelement in the Interexchange category. BellSouth did not file a petition for waiver to create this new element. Transmittal 351 is scheduled to become effective March 1, 1991.

2. When a caller seeking to make an interLATA call dials 0- and reaches a BellSouth operator, BellSouth plans to ask the caller to designate an interexchange carrier (IC) the caller would prefer to use. If that IC subscribes to OTS, the BellSouth operator would transfer the call to that IC. If the preferred IC is not an OTS subscriber, the operator would instruct the caller to disconnect and then dial the IC directly. If the caller has no preference for an IC, the operator will read a list of subscribing ICs from which the caller may choose. Description and Justification (D&J) at 1-2. The order of the names on the list would be changed monthly, with subscribers rotating up in order. New OTS subscribers would start at the bottom of the list and rotate up. *Id.* at 1-2, n. 2.

3. BellSouth will offer OTS on an Operator Services System (OSS) serving area basis. ICs would be able to subscribe to OTS in one or more OSS serving areas, but must agree to accept traffic from each end office in each LATA within an OSS serving area. In order to subscribe to OTS, an IC must have in place Feature Group C or Feature Group D trunks connecting its point of presence (POP) in each LATA within the OSS serving area with BellSouth's OSS location. *Id.* at 1-3.

4. BellSouth plans to charge a rate of $0.35 per interLATA call transferred. *Id.* at 3-1. This rate is based on an average of 25.4 operator work seconds per transferred call. *Id.* at 2-2 to 2-3. BellSouth projects there will be approximately 50 million requests for OTS from January 1, 1991 to December 31, 1991. *Id.* at 4-1. The result would be gross revenues of $17.6 million from OTS for that period. *Id.* at 5-1.

5. On November 5, 1990, International Telecharge, Inc. (ITI) filed a petition to reject, or in the alternative, suspend and investigate Transmittal 351, and a joint petition to reject or suspend and investigate the transmittal was filed by the Competitive Telecommunications Association, Operator Service Providers of America, Telesphere International, Inc, and NYCOM Information Services, Inc. (Joint Petitioners). ITI and the Joint Petitioners raise a number of legal and policy issues concerning the provision of OTS. ITI also challenges BellSouth's filing on the grounds that BellSouth should be required to file a waiver and that its cost support is inadequate.[1]

6. In the context of its argument that BellSouth should be required to obtain a waiver of the Commission's rules to establish OTS, ITI objects to BellSouth's choice of the Interexchange category for the new rate element. ITI argues that if BellSouth is to offer OTS, at a minimum it must comply with the access charge rules and assess the costs of the service to the access charge category as all the other local exchange carriers (LECs) have done. ITI Petition at 5.

7. ITI also contends that BellSouth has not provided adequate cost support, in violation of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. ITI claims that BellSouth has inflated the operator work seconds, and consequently the costs, by requiring unnecessary, extensive dialogue between the operator and the 0- caller. *Id.* at 14. ITI also argues that the sample size of 98 OTS calls was insufficient to estimate operator work seconds. *Id.* at 15. ITI further questions the allocation of 100 percent of the costs of OTS to the interstate jurisdiction and the 79.4 percent interstate utilization applied by BellSouth. *Id.* Finally, ITI complains that the two month study used by BellSouth to project demand was too short and does not take into account seasonal fluctuations. *Id.* at 16.

8. In its reply, filed November 16, 1990, BellSouth states that with the exception of the waiver issue, the petitioners have merely reiterated the objections which were raised against other OTS offerings and which the Commission has denied. BellSouth Reply at 1. BellSouth contends that it has provided adequate cost support for its transmittal. Specifically, it states that the sample phone calls were only intended to determine average operator work seconds, and that the proportion of types of calls it simulated were based on statistically valid sampling techniques of actual customer calls. *Id.* at 9-10. BellSouth also argues that the period used for the demand study is representative of a full year, and cites the fact that the period included two holidays. *Id.* at 11.

9. This Bureau, in an action taken on March 5, granted all LECs seeking to provide operator services waivers of Part 69.[2] However, we conditioned waiver of Part 69 upon the LECs' allocating all costs associated with the provision of those services to those operator service elements, rather than to the Interexchange category or the Information rate element. Therefore, BellSouth will be required to allocate the associated costs of these services to those same operator services access elements, consistent with that Order. The *Operator Services Waiver Order* also conditions grant of the blanket Part 69 waiver to provide operator services on the LEC's creation of separate operator service access elements for an operator transfer or line status service. BellSouth must comply with this condition as well.

10. With respect to issues raised by Transmittal 351, the Common Carrier Bureau has reviewed that transmittal, the petitioners' assertions, and related pleadings. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to require rejection, and that an investigation is not warranted at this time.

11. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate BellSouth Telephone Companies, Tariff F.C.C. No. 4, Transmittal No. 351, filed by International Telecharge, Inc., and the joint petitioners, Competitive Telecommunications Association, Telesphere International, Inc., Operator Service Providers of America, and NYCOM Information Services, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] In Ameritech Operating Companies, Petition for Waiver of Section 69.4(b) of the Commission's Rules, Memorandum Opinion and Order, DA No. 91-274, released Mar. 5, 1991 (Com.Car.Bur.) (*Operator Services Waiver Order*), we addressed the relevant legal and policy issues raised by petitioners regarding the granting of waivers to local exchange carriers (LECs) to establish operator services. Therefore, we address here only those arguments of petitioners which specifically concern the merits of BellSouth's offering in Transmittal 351.

[2] *See Operator Services Waiver Order*, at para._____ .

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 2789

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: March 6, 1991; Released: March 7, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 2789 to introduce Virtual Telecommunications Network Service (VTNS) Option 82 under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations.

2. MCI Telecommunications Corp. (MCI), Williams Telecommunications Group, Inc. (Williams), and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate Option 82 on January 3, 1991. AT&T filed a reply on January 14, 1991.

3. Petitioners contend that Option 82 raises the same issues as the options remanded by the U.S. Court of Appeals in the *Tariff 12 Remand* [1] and must be reviewed in light of the remand. *See* MCI Petition at 2; Williams Petition at 2; CompTel Petition at 3. Petitioners also argue that Option 82 impermissibly bundles 800 Service with SDN Service for the application of the Domestic Usage Volume Pricing Plan in violation of Section 201(b) of the Communications Act. *See* MCI Petition at 4; Williams Petition at 21-22; CompTel Petition at 6-7 (also alleging that AT&T is unlawfully leveraging its market power in international services).

4. MCI charges that Option 82 is comprised of constituent offerings that are available under standard AT&T tariffs and under other Tariff 12 service arrangements, and that AT&T has not provided adequate cost support as required by Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, to justify price differences between or among these services. MCI also contends that the Commission will need to review the underlying contracts to determine reliably whether price differences between Option 82 and other Tariff 12 options are justified. MCI Petition at 3-5 & 5 n.6.

5. Williams argues that Tariff 12 options are not generally available and that AT&T's cost support is inadequate. Williams Petition at 14-18; *see also* CompTel Petition at 7-9. Williams also claims that Tariff 12 packages violate the Commission's resale policy because their customized nature prevents them from being used by resellers. Williams Petition at 18-19. Williams further contends that the Commission should adopt, or require AT&T to adopt, safeguards to remedy any unlawful discrimination that will occur if Option 82 takes effect. *Id.* at 23-26.

6. AT&T replies that the *Tariff 12 Remand* "creates no conceivable basis to reject or suspend VTNS offerings." Rather, AT&T argues that it "reaffirms AT&T's right 'to compete effectively in the large user market.'" AT&T Reply at 3. In addition, AT&T contends that the Commission correctly found that integrated service packages are not "like" combinations of piece-part services obtained under AT&T's other tariffs. *Id.* at 3-4.

7. AT&T also argues that claims of discrimination among VTNS options are unfounded because all options are generally available (and generate positive net revenues). AT&T further contends that since VTNS is not "like" a combination of separately tariffed services such as 800 Service and SDN, any prohibition against such an offering would not apply. *Id.* at 4. Finally, AT&T claims that allegations of inadequate cost support are totally unfounded. *Id.* at 4-5.

8. The Common Carrier Bureau has reviewed AT&T Transmittal No. 2789, the petitions filed by MCI, Williams, and CompTel, and related pleadings. We conclude that no compelling argument has been presented that this tariff is so patently unlawful as to warrant rejection.

9. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990). Although this transmittal does not present new questions that warrant investigation at this time, it could be affected by the Commission decision in the CC Docket No. 87-568 remand proceedings. Accordingly, Transmittal No. 2789 takes effect subject to the outcome of the remand proceedings in CC Docket No. 87-568.

10. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 2789 filed by MCI Telecommunications Corp., Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE DENIED.

11. IT IS FURTHER ORDERED that Transmittal No. 2789 takes effect subject to the outcome of remand proceedings in AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] *See MCI Telecommunications* Corp. v. FCC, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990) (*Tariff 12 Remand*).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 6, 1991

BELL ATLANTIC TELEPHONE COMPANIES FILE APPLICATION FOR AUTHORITY TO CEASE OFFERING INTERSTATE DARK FIBER FACILITIES

Pleading Cycle Established

On February 13, 1991, the Bell Atlantic Telephone Companies (Bell Atlantic) filed an application for authority pursuant to Section 214 of the Communications Act of 1934 and Sections 63.01 *et seq.* of the Commission's Rules to cease offering interstate dark fiber facilities.

Bell Atlantic states that it filed a limited number of interstate dark fiber facilities at individual case basis (ICB) rates during the period March 1984 through June 1988. Bell Atlantic further states that in 1988, it made a business decision to "discontinue" its offering of dark fiber facilities,[1] and ceased to submit bids for such arrangements. On August 6, 1990, the Commission ordered Southwestern Bell Telephone Company, Bell Atlantic Telephone Companies, BellSouth Telephone Companies, and the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company to file generally available, averaged rates for dark fiber facilities. Bell Atlantic and the other affected local exchange carriers (LECs) requested waivers of this requirement. The waiver requests were denied on October 26, 1990, and the Common Carrier Bureau ordered the four LECs to file dark fiber rates on November 1, 1990. Bell Atlantic states that it does not wish to re-enter the market for interstate dark fiber facilities and therefore has filed the above-mentioned application to discontinue providing interstate dark fiber facilities.

The basic statutory test applied to a Section 214 application to discontinue service is whether the current or future public convenience and necessity will be adversely affected by such a discontinuance. Interested parties are asked to comment on whether Bell Atlantic's discontinuance of dark fiber service will adversely affect the current or future public convenience and necessity. Parties wishing to address this issue should file petitions regarding the Bell Atlantic application no later than March 22, 1991. Bell Atlantic may file an opposition to those petitions no later than April 5, 1991. Replies to any such opposition may be filed no later than April 12, 1991.

Copies of Bell Atlantic's application, along with other related documents, may be obtained from the Downtown Copy Center (DCC). The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W. An original and four copies of all petitions and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules. In addition, one copy of each comment or reply must be filed with DCC.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

FOOTNOTE

[1] On February 27, 1991, Bell Atlantic filed an amendement to its application by incorporating as Exhibit I an "Information Bulletin" which verifies that Bell Atlantic voluntarily chose to exit the dark fiber business in 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 21, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NECA'S PETITION FOR DECLARATORY RULING CONCERNING INTERSTATE COMMON LINE ALLOCATION OF OTHER BILLING AND COLLECTING EXPENSE

On March 8, 1991, the National Exchange Carrier Association, Inc. ("NECA") filed a petition for declaratory ruling concerning the interstate common line allocation of other billing and collecting expense under Parts 36 and 69 of the Commission's rules. NECA asks the Commission to declare that: (1) Section 36.380 of the rules permits exchange carriers to employ a user count methodology to identify Other Billing and Collecting ("OB&C") expense associated with end user common line access charge billing; and (2) Section 69.407 of the rules does not place a five percent limitation on the amount of OB&C expense that may be allocated to the interstate common line access element. The petition also seeks a declaration that NECA must permit its member carriers to employ a user count methodology to segregate OB&C expense associated with end user common line access charge billing, for NECA common line pool reporting purposes retroactive to January 1, 1989.

Interested parties may file comments on this petition no later than **April 19, 1991,** and reply comments no later than **May 7, 1991,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. All pleadings should reference file number **AAD 91-3.** A copy of each pleading should also be sent to Richard Welch, FCC, Common Carrier Bureau, Accounting and Audits Division, 2000 L Street, N.W., Room 257, Washington, D.C. 20554, and to the Commission's contractor for public records duplication: Downtown Copy Center, 1114 21st Street, N.W., Suite 140, Washington, D.C. 20037. Copies of NECA's petition are available for public inspection and copying at the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from Downtown Copy Center at (202) 452-1422.

For further information contact Richard Welch, Accounting and Audits Division of the Common Carrier Bureau, at (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-453

In the Matter of

Amendment of Section 73.202(b), RM-7337
Table of Allotments,
FM Broadcast Stations.
(Columbus, Kansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 7, 1991; Released: March 21, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6175 (1990), issued in response to a petition filed by Saturn Communications, Inc. ("petitioner"), proposing the substitution of FM Channel 287C3 for Channel 252A at Columbus, Kansas. Petitioner requested modification of its license for Station KOCD(FM), Channel 252A, to specify operation on Channel 287C3. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. Demaree Media, Inc., submitted supporting comments in the form of a counterproposal as well as reply comments supporting its proposal and the instant proposal.[1]

2. We believe the public interest would be served by the substitution of Channel 287C3 for Channel 252A at Columbus, Kansas, since it could provide the community with its first wide coverage FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site, 11.8 kilometers (7.3 miles) south of the community.[2] In addition, we have authorized a modification of the petitioner's license for Station KOCD(FM), Columbus, Kansas, to specify operation on Channel 287C3 in accordance with Section 1.420(g) of the Commission's Rules, since no other expressions of interest have been received.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 6, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Columbus, Kansas	287C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KOCD(FM), Columbus, Kansas, IS MODIFIED to specify operation on Channel 287C3 in lieu of Channel 252A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Demaree Media, Inc., requests the allotment of Channel 252C3 at Bentonville, Arkansas, if 252C3 is deleted at Columbus. Although timely filed, the proposal will not be considered as a counterproposal, as it is not mutually exclusive to any proposal in this proceeding. Demaree Media's request will be treated as a petition for rule making (RM-7586) and considered in a separate proceeding.

[2] The coordinates for Channel 287C3 at Columbus are 37-04-02 and 94-50-10.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cincinnati Bell Telephone Company — Transmittal No. 578

Revisions to Tariff F.C.C. No. 35

ORDER

Adopted: March 12, 1991; Released: March 12, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On December 12, 1990, Cincinnati Bell Telephone Company (CBT) filed Transmittal No. 578, a mid-course correction to retarget its access rates to earn the authorized rate of return (ROR) for the remainder of the July 1990 through June 1991 tariff period. On December 28, 1990, MCI Telecommunications Corporation (MCI) filed a petition to reject or, in the alternative suspend and investigate. CBT filed its reply on January 10, 1991. Transmittal 578 is scheduled to become effective on March 13, 1991. For the reasons discussed below, we reject Transmittal 578.

II. BACKGROUND

2. CBT claims that its annualized overall rate of return for July through September 1990 is 9.28 percent, well below the authorized 12 percent ROR.[1] *Id.* at 1. The result is that CBT projects that the July 1990 rates would produce a revenue shortfall of $3.9 million for the June 1990 through July 1991 rate period, based on a 12 percent ROR. Workpaper 1, line 12, column H.

3. In order to raise its earnings to the authorized level, CBT would increase rates for Common Line, Special Access, Equal Access, and Local Transport. According to CBT, the primary reasons for the underearnings in these categories are a shortfall in access revenues, a rate base that exceeds that allowed by the Commission in the *1990 Annual Access Order*,[2] and higher than forecasted costs due to an accelerated construction program. *Id.* at 2-5. CBT would reduce Local Switching rates to bring earnings down to the authorized level. *Id.* at 7. However, CBT does not plan to change its Information rates. It states that the rates are skewed because an OSPS switch was included in the rate base starting in July, but was not actually placed in service until December 1990. CBT contends that after the rate base is increased to account for this new equipment, earnings will be at or below the authorized ROR. *Id.* at 6.

4. To true-up its rate of return, CBT developed rate adjustment factors (RAFs) to retarget earnings to the authorized 11.25 percent ROR. The RAFs were multiplied by the rates submitted by CBT in its November 1, 1990 represcription filing, to ensure the new rates reflect the 11.25 percent authorized rate of return. *Id.* at 9-10.

III. PLEADINGS

A. Petition

5. MCI complains that in Transmittal 578, CBT is projecting an access revenue requirement of $95.779 million, which not only exceeds the $93.468 million allowed by the Commission,[3] but is also greater that the $95.634 million revenue requirement CBT projected in its 1990 annual access filing. MCI Petition at 2. MCI claims that in developing this proposed revenue requirement CBT used fatally flawed revenue analysis and is attempting to include unsubstantiated and unjustified cost overruns. In addition, MCI argues that the Commission should be wary of non-Price Cap carriers attempting to raise their rates. It contends that the Commission should require a significant showing of necessity before accepting such transmittals since any rate increases could be locked in by the carrier if it decides to switch to price cap regulation. *Id.*

6. Specifically, MCI complains that CBT developed its revenue projection for the July 1990 through June 1991 rate period by multiplying by four the third quarter 1990 actual data. MCI argues that this method yields distorted results since it excludes several factors which will have a positive impact on future earnings, including seasonal differences in quarterly traffic, long-term effects of the July 1990 access cost reduction flow through, and growth in minutes of use. Based on its review of CBT's monthly Carrier Common Line (CCL) minutes of use for the July 1988 through June 1989 rate period, MCI contends the proper multiplier for total chargeable CCL minutes is 4.216. *Id.* at 3. Using this multiplier, MCI found that CBT will only have a $33,000 revenue shortfall. *Id.* at 4.

7. MCI also contends that the Commission should not accept the rate base in Transmittal 578. According to MCI, CBT is trying to circumvent the Bureau's *1990 Annual Access Order* by using this transmittal to place the costs of the accelerated construction in the rate base without full cost support. MCI complains that this leaves ratepayers without any ability to analyze and comment on whether these new expenditures are just and reasonable. *Id.* at 5. In addition, MCI contends that it is unreasonable for CBT to underrun Information element costs by 71.46 percent and still expect to achieve the authorized rate of return. *Id.*

B. CBT Reply

8. CBT responds that MCI's criticism of the methodology it used to develop the revenue requirements is unfounded. First, CBT argues that it developed the rates using a methodology endorsed by the Commission. CBT Reply at 2. Second, CBT argues that in making its calculations MCI only factored in growth in demand and did not take into account growth in costs. According to CBT, the Commission has stated that there is no strong basis for assuming that relationships between costs and demand will differ between rate periods, so any adjustment for increased demand should be offset by a corresponding increase in cost. *Id.* at 2-3. In any event, CBT argues that the Commission's endorsed methodology for mid-course corrections does not require that type of adjustment. *Id.* at 3.

9. CBT also argues that MCI's analysis is flawed because it analyzes the entire Common Line category based on minutes of use. According to CBT, 93 percent of its revenue requirement for CL is based on access lines, and not minutes of use. *Id.* at 3. Finally, CBT contends that MCI's argument that the adjustments in Transmittal 578 are premature is without merit since the Commission allows local exchange carriers to revise their rates at any time, based on actual experience. *Id.* at 3-4.

IV. DISCUSSION

10. After reviewing Transmittal 578 and the reply comments of CBT, we do not believe that CBT has complied with Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, by providing the information specified therein as necessary for the Bureau to make a determination of whether the rate increases should be accepted without investigation. Therefore, we are compelled to conclude that the transmittal must be rejected.

11. CBT does not provide information necessary to assess whether its projected revenue requirement for access service is accurate. Workpaper 2 shows that CBT has computed a $1.97 million increase in its rate base over what it projected in its 1990 annual access filing ("filed rate base"),[4] and shows the breakdown of this increase between the six Access categories. Workpaper 2, line 3. CBT, however, does not provide any explanation for these increases. For example, in Special Access there is a $1.60 million increase between CBT's actual rate base and its filed rate base. Workpaper 2, p. 3, line 3, column W. The only comment made by CBT regarding this increase is that it is primarily due to accelerated construction and different usage patterns for Category 4.12 Exchange Trunk X/WB than CBT used in its annual access filing. D&J at 3. Nowhere are the relative costs of these factors presented or explained, and there is no mention of other factors involved in this increase in the rate base.

12. Further, according to CBT a major reason for the increased rate base is its accelerated construction program. CBT does not explain this construction program, however, or how it has been accelerated, even though MCI specifically raised numerous questions about this issue in its petition. *See* MCI Petition at 4-5. From CBT's submissions, we cannot tell if the increase in the rate base due to the accelerated construction program is due to increased costs of construction, CBT's building more plant during the year than originally planned, changes in the specifications of the plant being constructed, or some combination of these or other factors. We cannot even determine the total additional cost of this accelerated construction program.[5]

13. While CBT is correct in stating that a local exchange carrier may file a mid-course correction at any time, based on actual experience, the rate revisions must be accompanied by the information described in our rules. The evidence provided in Transmittal 578 and CBT's reply comments does not comply with Section 61.38 of the Commission's Rules, 47 C.F.R. §61.38.[6] We therefore reject Transmittal 578.

V. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that Cincinnati Bell Telephone Company, Tariff F.C.C. No. 35, Transmittal No. 578 IS REJECTED.

15. IT IS FURTHER ORDERED that Cincinnati Bell Telephone Company SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material from its tariff. These revisions shall be scheduled to become effective on not less than one day's notice.

16. IT IS FURTHER ORDERED that Special Permission No. 91-192 IS ASSIGNED and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, ARE WAIVED for the purposes of issuing the above revisions.

17. IT IS FURTHER ORDERED that the petition against Cincinnati Bell Telephone Company, Tariff No. 35, Transmittal No. 578, filed by MCI Telecommunications Corporation IS GRANTED to the extent discussed herein, and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Based on its actual earnings in those three months, CBT claims the following annualized earnings in each of these categories: Common Line 9.31 percent; Local Transport 5.50 percent; Special Access 9.18 percent; Information 56.05 percent; Equal Access 9.83 percent; and, Local Switching 12.73 percent. D&J at 2-7, and Workpaper 1, line 11.

[2] Annual 1990 Access Tariff Filings, CC Docket No. 90-320, Memorandum Opinion and Order, 5 FCC Rcd 4177 (Com.Car.Bur. 1990) (*1990 Access Order*).

[3] *See 1990 Annual Access Order*; Annual 1990 Access Tariff Filings, CC Docket 90-320, Memorandum Opinion and Order, 5 FCC Rcd 6015 (Com.Car. Bur. 1990).

[4] In the *1990 Annual Access Order* the Bureau disallowed $20.096 million from CBT's filed Total Plant in Service (TPIS). Thus, the rate base proposed by CBT in Transmittal 578 represents an increase of $22.054 million from what the Bureau allowed ($146.268 million minus $124.214 million).

[5] In describing the changes in Common Line, CBT states that $651,942 is due to its accelerated construction program. D&J at 2. In discussing Special Access, CBT states that accelerated construction is a primary factor for a $1.60 million increase in the rate base, but gives no dollar figures for the construction itself. *Id.* at 3. CBT attributes a $1.94 million increase in the Local Transport rate base to several factors, including the accelerated construction program, but none of these factors is substantiated. *Id.* at 4-5.

[6] The Bureau granted a waiver of Section 61.38(b)(1) to allow CBT to file Transmittal 578 with only three months of actual data. Special Permission No. 90-1280, dated Dec. 7, 1990. However, the waiver did not relieve CBT of the obligation to provide an explanation of the changes in the transmittal or the obligation to provide economic support for those changes.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The NYNEX Telephone Companies — Transmittal No. 10

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: March 14, 1991; Released: March 14, 1991

By the Chief, Common Carrier Bureau:

1. On March 1, 1991, the NYNEX Telephone Companies (NYNEX) filed Transmittal No. 10 to adjust, within established price cap bands, several Switched Access rates in their interstate access service tariff. Specifically, NYNEX would reduce Local Transport Facility and Directory Assistance Transport Facility rates, and increase Local Switching rates. Transmittal 10 is scheduled to become effective March 15, 1991.

2. On March 8, 1991, MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Transmittal 10 on the grounds that the rate changes would lead to discriminatory pricing of the Local Switching and Local Transport access elements. MCI Petition at 1. MCI claims that if NYNEX is allowed to continue this rate of increase, switching costs will increase over 20 percent during the first four years of price cap regulation. *Id.* at 2. MCI also objects that NYNEX's transmittal would reduce the Local Transport Facility rate by 27 percent in New York and only 11 percent in New England. *Id.*

3. NYNEX filed a reply on March 12, 1991, asserting that Transmittal 10 is presumptively lawful under price cap rules because the rate changes are within the price cap index for the Traffic Sensitive basket and within band limits for each service category. NYNEX Reply at 1-2. NYNEX argues that MCI failed to raise any issue that would warrant investigation because it does not dispute that transmittal 10 complies with the requirements of the price cap rules. *Id.* at 2.

4. The Common Carrier Bureau has reviewed NYNEX's Transmittal 10 and MCI's petition to suspend and investigate. We conclude that no compelling argument has been presented that warrants suspension and investigation at this time.

5. Accordingly, IT IS ORDERED that the petition to suspend and investigate the NYNEX Telephone Companies Transmittal No. 10 filed by MCI Communications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Editorial Amendment of Part 95,
Subpart A, of the Commission's
Rules Regarding the General
Mobile Radio Service.

ERRATUM

Released: March 20, 1991

The instruction in item 8 of the Appendix to the Order in the above-captioned proceeding, adopted December 5, 1990, and released on December 12, 1990 (DA 90-1776), erroneously referred to Section 97.181 as being amended by removing and reserving paragraph (b) thereof. The item 8 instruction should have stated that Section 95.181 was being amended.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-424

In re Applications of

ASPEN FM, INC. File No. BPH-850712PH

AJAX MOUNTAIN BROADCASTING CORPORATION File No. BPH-850712PR

For Construction Permit for
New FM Station, Channel 296A,
Aspen, Colorado

ORDER

Adopted: March 11, 1991; Released: March 21, 1991

By the Commission:

1. Before the Commission is an Application for Review filed June 25, 1990, by Ajax Mountain Broadcasting Corporation (Ajax), and an Opposition and Errata filed July 10 and 11, 1990, by Aspen FM, Inc. (Aspen). These pleadings relate to a Review Board decision, *Aspen FM, Inc.*, 5 FCC Rcd 3196 (1990), which granted Aspen's application and denied Ajax's application on the basis that it was not financially qualified. For the reasons that follow, we reject Ajax's arguments that the Board erred in holding that it was financially unqualified.

2. Sue Ann Todhunter, Ajax's president/treasurer and majority voting stockholder, certified Ajax's financial qualifications in its application filed July 12, 1985. Todhunter claimed that Steven P. Hubert, Ajax's financial backer and majority non-voting stockholder, had agreed to provide all the funds Ajax needed to prosecute its application, construct the station, and operate it for three months without revenue, and that a loan agreement had been executed by her and Hubert on July 9, 1985 (Aspen FM Ex. 30). 5 FCC Rcd 3196, 3197 ¶¶ 6-7.

3. The Board found, however, that the loan agreement did not commit Hubert to provide the entire amount ($475,343) Ajax needed to construct and operate the station because of the funding conditions specified therein, which provided that Hubert was to fund Ajax in four distinct and specific phases, and he had to expressly approve continuing to each phase of Ajax's project before the funds needed for the next phase would be provided.[1] The Board also found that Hubert never made available to Todhunter a balance sheet or financial statement establishing his ready liquidity. He did, however, inform Todhunter at the time the agreement was executed that he intended to use his lines of credit with the Maryland National Bank to meet his loan commitment to Ajax, and that Todhunter could check with the bank to verify those lines of credit (Tr. 3292-3298). Todhunter did not attempt to confirm Hubert's lines of credit (Tr. 3004-3006). When the records of the Maryland National Bank became available, the Board found that they showed that Hubert's 1985 lines of credit could only be used for real estate investments, and Hubert did not seek the bank's approval to use them to invest in Ajax until 1988. 5 FCC Rcd at 3197 ¶¶ 6-10.

4. Based on the foregoing, the Board found that, when Todhunter certified Ajax's financial qualifications, she did not have reasonable assurance of committed loan funds from Hubert to construct and operate Ajax's station for three months without revenue, nor did she have reasonable assurance of Hubert's ready liquidity to meet his loan commitment to Ajax. Accordingly, the Board concluded that Ajax was not financially qualified when it filed its application and denied its application on that basis. 5 FCC Rcd at 3199 ¶¶ 17-20.

5. Ajax argues in its application for review that it demonstrated at hearing, consistent with *Northampton Media Associates*, 4 FCC Rcd 5517 (1989), that it had reasonable assurance of committed loan funds from Hubert when it filed its application, based on Hubert's hearing testimony that he intended to fund Ajax's project through its completion, and on Todhunter's hearing testimony that she believed that Hubert intended to provide all the funds Ajax needed. According to Ajax, the Commission in *Northampton* indicated that, when a financial qualifications issue is specified against an applicant which has certified its financial qualifications, the applicant can adduce evidence at hearing to demonstrate that it had reasonable assurance of financing at the time of certification. Ajax contends that it did precisely that based on the above testimony of its witnesses, and that the Board erred in failing to accept its showing.

6. We find no merit to Ajax's argument, inasmuch as it is based on an erroneous interpretation of the Commission's holding in *Northampton*. While the Commission did indicate there that an applicant, which certified its financial qualifications, could show at hearing that it had reasonable assurance of committed loan funds when it filed its application, it further explained that *the applicant must adduce probative evidence* to do this. Applying the foregoing probative evidence test to the evidentiary showings submitted by Ajax to establish that it had reasonable assurance of committed loan funds from Hubert in 1985, the Board properly concluded that Ajax's pre-certification loan agreement, which by its express terms demonstrated that Hubert was not obligated to provide all of the funds Ajax needed to construct and operate the station, was more probative and entitled to more evidentiary weight than the self-serving testimony of Ajax's witnesses years later at the hearing. The Board thus correctly concluded that Ajax failed to establish that it had reasonable assurance of committed loan funds at the time of certification. Based on our review, we find that the Board's determination is based on substantial record evidence and reject Ajax's contention that the Board's evaluation of the evidence was either arbitrary and capricious or inconsistent with the Commission's pronouncements in *Northampton*.

7. Ajax's further contention that it showed at hearing that Hubert had sufficient liquid assets to meet his loan commitment to Ajax at the time it filed its application is similarly flawed. Its reliance on the testimony of an official of the Maryland National Bank, who stated that he knew of no reason why the bank would not have removed the restrictions on Hubert's lines of credit had he re-

quested their removal in 1985, is unavailing. As the Board aptly pointed out, the records of the bank contemporaneous with the certification showed otherwise, and that documentary evidence is more probative and entitled to more evidentiary weight than the subjective testmony of Ajax's witness.

8. Furthermore, as mentioned, Todhunter had not seen a 1985 balance sheet or financial statement evidencing Hubert's financial ability to meet his loan commitment to Ajax when she certified the application; nor had she taken steps to verify the existence of Hubert's 1985 lines of credit. *See* paragraph 3, *supra*. Indeed, the most Todhunter knew of Hubert's financial wherewithall at that time was based on second-hand information derived from Yvonne Schell, who recruited Hubert as an Ajax investor, acted as his go-between in most of Todhunter's prior dealings with him, and informed Todhunter that, based on her analysis of a copy of Hubert's financial statement, he was financially capable of financing Ajax's entire project (Tr. 2930). However, as the Commission indicated in *Northampton*, the applicant must demonstrate that it has taken the necessary steps to ascertain that the lender, when not a financial institution, has sufficient financial resources to meet his loan commitment at the time of certification, and that reliance on the self-serving statement of the indivdual responsible for the certification that he took the appropriate steps to secure the needed funds would not be sufficient to demonstrate that it met its burden in this respect.[2] For this additional reason, we find that Ajax failed to demonstrate that it had reasonable assurance of committed loan funds at the time of certification.

9. In view of the above, and having reviewed the Board's decision in conjunction with other pertinent evidence compiled in this respect, we agree that the financial qualifications issue specified against Ajax must be resolved against it, and that its application must be denied for its failure to demonstrate that it possessed the requisite qualifications to be a licensee when it filed its application. The Commission has long-held that the applicant has the burden of demonstrating that it possesses the qualifications to be a Commission licensee pursuant to 47 U.S.C. § 308(b). *See, e.g., Midwest Radio-Television, Inc.*, 24 FCC 2d 625, 626 ¶ 4 (1970).

10. A further matter warrants brief discussion. In the *Initial Decision*, 4 FCC Rcd 4642 (1989), the Adminstrative Law Judge (ALJ) resolved in Ajax's favor the financial qualifications issue specified against it. [3] In so doing, the ALJ reasoned that, because a financial issue looks forward, he could analyze Ajax's more recent 1988 financial proposal to determine whether it is financially qualified to be a licensee.[4] *Id.* at ¶ 6. Based on his analysis of that financial proposal, the ALJ found that Ajax was financially qualified (*id.* at ¶ 7-10) and resolved the financial qualifications issue favorably to Ajax. *Id.* at 4648 ¶ 4.

11. In its decision, the Board held that the ALJ's rationale that a financial issue is forward looking and does not depend on the applicant's financial condition at the time of certification was plain legal error. 5 Rcd at 3198 ¶ 15. For the reasons that follow, we hold that the ALJ not only erred in that respect, but also erred in accepting Ajax's new financial proposal into evidence in the absence of a petition to amend filed pursuant to 47 C.F.R. § 73.3522(b) demonstrating the type of good cause showing required as discussed in paragraphs 12 and 13, *infra*. For those same reasons, we reject Ajax's arguments that the ALJ correctly held that it was financially qualified.

12. Prior to 1981, before the Commission adopted its (now-abandoned) certification procedures, 50 RR 2d 381 (1981), the Commission generally followed a liberal amendment policy in mutually exclusive broadcast cases, which permitted applicants to remove fatal deficiencies in their financial proposals.[5] At that time, applicants could amend the financial proposals during the hearing in response to financial issues specified against them. However, applicants were then also required to include a fairly detailed financial proposal as part of their applications. This practice changed with the adoption of the certification procedures. Under our certification procedures, applicants were no longer required to submit any financial information with the application. This approach, the Commission realized, was subject to serious abuse, with applicants having the opportunity to certify their financial qualifications without any basis or justification and then to formulate a financial proposal later. *In the Matter of Certification of Financial Qualifications*, 2 FCC Rcd 2122 (1987). To prevent this, the Commission's focus shifted in cases where there was a good cause question concerning a revised proposal, to first determining the validity and substance of the applicant's original financial proposal at the time of certification in passing on petitions proposing subsequent financial amendments. Moreover, as mentioned (n.5, *supra*), the Commission has also determined that its former liberal amendment policy was inconsistent with its objective of stabilizing applicants' proposals at the beginning of the proceeding and that that policy had disrupted and delayed hearing proceedings in conflict with the goal of expeditiously providing new services to the public which the Commission sought to achieve in its *Revised Procedures for the Processing of Contested Broadcast Applications*, 72 FCC 2d 202 (1979). *See also, e.g., Report and Order*, 58 RR 2d 776 (1985), establishing the Commission's "hard look" approach for handling FM applications, and its institution in some services of entirely new procedures (lotteries) for awarding licenses, 53 RR 2d 1401 (1983).

13. Thus, initial financial qualifications have become a critical ingredient in a good cause showing for such amendments and, in the absence of a demonstration by the applicant that it had reasonable assurance of financing at the time of certification, subsequent petitions to amend financial proposals have been disallowed.[6] *See, e.g., Edwin A. Bernstein*, 4 FCC Rcd 8420 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 2843 (1990); and *Pepper Schultz*, 103 FCC 2d 1052, 1058-59 ¶ 6 (Rev. Bd. 1986), *rev. denied*, 2 FCC Rcd 1476 (1987), *recon. granted in part*, 3 FCC Rcd 1200 (1988), where the Commission indicated that an applicant may not certify its financial qualifications and then obtain financing. Given the above, the Board correctly held that Ajax could not rely on a modified financial proposal to meet the financial issue specified against it, in the absence of a showing that it had reasonable assurance of necessary financing at the time it filed its application. *See Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5751 ¶¶ 3-6 (1990) (applicant was not financially qualified where it failed to demonstrate reasonable assurance of a loan commitment from a bank at the time the application was filed), and *Opal Chadwell*, 4 FCC

Rcd 1215, 1217 ¶ 20 (1989) (validity of applicant's original financial proposal must be established before it could rely on a new financial proposal).

14. Finally, the Board in its decision refused to consider Ajax's exceptions to the *Initial Decision* which alleged prejudgment and bias by the ALJ. 5 FCC Rcd 3196 ¶¶ 2-4. The Board held that it was not the appropriate forum to consider these matters since the Commission had reserved to itself jurisdiction over such questions,[7] and that Ajax should have proceeded under 47 C.F.R. § 1.245, which specifically provides procedures for the removal of an ALJ on the basis of bias and prejudice. In view of the holding herein that the record provides ample basis for denial of Ajax's application under the financial qualification issue, its contentions that other aspects of the ALJ's findings concerning its application are based on bias and prejudice are moot, and thus no further consideration is required of the question of whether the Board erred in refusing to consider pages 5-12 of Ajax's exceptions. *See* n.2, *supra*.

15. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 C.F.R. § 1.115, the Application for Review filed June 25, 1990, by Ajax Mountain Broadcasting Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Phase I funding was limited to $18,000, which was to be used solely for prosecuting Ajax's application through acceptance for filing by the Commission; Phase II funding was an additional $65,000, which was to be used solely for prosecuting the application through the comparative proceeding; Phase III funding was an additional $250,000, which was to be used solely for constructing the station and start-up operations; and Phase IV funding was an additional $350,000, which was to be used solely for the continued operation of the station.

[2] In *Northampton*, the individual certifying the application had personal knowledge of the lender's financial worth (4 FCC Rcd at 5518 ¶¶ 7-8), whereas here Todhunter had never met Hubert prior to their execution of the loan agreement and relied solely on second-hand information as to his financial ability to meet his loan commitment to Ajax.

[3] The ALJ denied Ajax's application based on misrepresentations, including knowingly misrepresenting its financial qualifications at the time of certification, under a misrepresentation/false financial certification issue that was also specified against it. The Board did not reach, nor have we, the ALJ's determination that Ajax should be disqualified under that issue, or Ajax's exceptions that the record reflects no intent to deceive.

[4] Aware that its financial qualifications were being challenged as a result of the ALJ adding issues against it, Ajax amended its 1985 loan agreement to remove the conditional funding provisions specified therein, and Hubert also took steps to have the bank remove the real estate restrictions on his lines of credit. Ajax then proffered at the hearing its new 1988 financial proposal, and the ALJ accepted it into evidence.

[5] The Commission then sought the broadest choice among applicants in order to obtain the optimum in ultimate service to the public. More recently, the Commission has determined that that policy often disserved the public interest by inordinately delaying new service to the public. *See, e.g., Cuban-American Limited*, 5 FCC Rcd 3781, 3782 ¶ 5 (1990), *recon. denied*, _____ FCC Rcd _____ (1990), and *Chudy Broadcasting Corp* 58 RR 2d 133, 134 n.7 (1985).

[6] One exception to this requirement is set forth in 47 C.F.R. § 73.3522(b)(2), which allows in comparative broadcast cases amendments relating to issues first raised in the hearing designation order (HDO) to be filed as a matter of right within 30 days of the HDO. For the reasons set forth above, we believe that this exception, which is limited by the terms of the specific regulatory provision to a brief period of time immediately following the start of the proceeding, should not be extended to later portions of the proceeding where the risk of disruption and delay in the institution of new service is much greater.

[7] The Commission recently amended its rules delegating authority to the Board to act on appeals of questions concerning an ALJ's bias and prejudice under 47 C.F.R. § 1.245. 5 FCC Rcd 5366 (1990). However, that rule amendment was promulgated after the Board decided this case.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 89-44

In the Matter of

Procedure for measuring
electromagnetic emissions from
digital devices

ERRATA

Released: March 21, 1991

The *Further Notice of Proposed Rule Making*, FCC 91-2, released February 1, 1991, 6 FCC Rcd 600 (1991), in the above entitled matter is corrected as follows:

1. The last sentence in paragraph 5 of the text of the *Further Notice of Proposed Rule Making* is corrected to read: "The resulting test procedure, C63.4-1991, basically follows the technical framework and initiatives set forth in the TP5 proposal, yet imposes no additional testing burden on digital devices beyond the current test procedures in MP-4 or the technical requirements in the FCC Rules."

2. The first sentence in paragraph 11 of the text of the *Further Notice of Proposed Rule Making* is corrected to read: "Pursuant to the applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before May 7, 1991, and reply comments on or before June 6, 1991."

The above corrections resolve an editorial error that occurred during publication and include the comment and reply comment dates which were omitted from the text of the proceeding in the FCC Record. This information was contained in a summary of this proceeding which was published in the Federal Register on February 21, 1991 (56 FR 7004).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 84-397

In re Applications of

EVERGREEN BROADCASTING COMPANY
Evergreen, Colorado
et al.

File No. BPH-821216AC et al.

For Construction Permit
for a New FM Station
Evergreen, Colorado

ORDER

Adopted: November 26, 1990; Released: November 27, 1990

1. By an Order, adopted on September 29, 1989, the General Counsel approved a settlement agreement between the above captioned applicants and third party Susquehanna Radio Corporation, granted a petition for leave to amend, filed on August 11, 1989 by Evergreen Radio, Inc. (ERI), accepted an amendment modifying ERI's ownership and engineering proposals, granted ERI's amended application, and dismissed the other nine applications for a new FM station in Evergreen, Colorado. *Evergreen Broadcasting Company*, 4 FCC Rcd 8224 (OGC 1989). Due to the pendency of an Application for Review, filed November 1, 1989 by Eileen Weppner,[1] that Order is not yet final.

2. In a Motion, filed on September 28, 1990, ERI notes that the settlement agreements, entered into over a period of time from July 5 to August 6, 1989, provided that they could be terminated if not finally approved within eleven months of their execution. As the Order approving the settlement is not final, the agreements have lapsed and Susquehanna has notified the parties of their termination. Accordingly, ERI requests withdrawal of the Joint Request, dismissal of Weppner's pending Application for Review, withdrawal of the ownership portion of the Amendment as well as the Petition for Leave to Amend, and return of this proceeding to active hearing status. Noting that Weppner did not object to that portion of the amendment specifying a new antenna site on Mount Morrison (in place of the Doublehead Mountain site initially specified by all the applicants except Lord Broadcasting), ERI requests that it be allowed to prosecute its application with the amended engineering proposal.

3. In response to ERI's Motion, Weppner filed a Partial Opposition on October 9, 1990, and Group Y Communications Investment Partnership filed Comments on October 10, 1990. ERI filed a Reply on October 12, 1990. Also before the Commission are: (a) Petition for Leave to Amend, filed on October 22, 1990 by Evergreen Ventures, Inc. (EVI); (b) a Motion For Leave to Supplement Application for Review, and Supplement to Application for Review, filed November 7, 1990 by Evergreen Broadcasting Company; and (c) Petition for Leave to Amend, filed November 16, 1990 by Best-Evergreen Broadcasting Co. (Best).

4. Weppner opposes ERI's Motion to Withdraw insofar as it requests dismissal of Weppner's Application for Review without also vacating the underlying order approving the settlement. In its Reply, ERI states that it does not object to vacation of the underlying order, provided this does not delay ultimate resolution of this protracted proceeding. Group Y generally supports ERI's Motion to Withdraw, but it opposes the request that ERI be allowed to prosecute the engineering amendment in its own name. In Reply, ERI denies that it will realize any comparative advantage as a result of the site change. ERI explains that, rather than seeking such an advantage, it learned during the settlement negotiations of the original site's unavailablity and it is simply trying to ensure its continuing qualifications to prosecute its application. Thus, when the settlement (relying on the Mount Morrison site) fell apart, ERI confirmed that the original Doublehead Mountain site was no longer available, and obtained a site availability letter for Mount Morrison.

5. By their Petitions for Leave to Amend, EVI and Best-Evergreen also seek to incorporate by reference the engineering materials submitted in connection with ERI's August 11, 1989 Petition for Leave to Amend. Each certifies that it has timely obtained Susquehanna's permission to use the engineering prepared by Susquehanna for ERI's August 11, 1989 Petition for Leave to Amend, and that it has obtained reasonable assurance of the site's availability by contacting the attorney for the owner of the Mount Morrison site. The Petitions for Leave to Amend, filed by Best and EVI seeking to specify the Mount Morrison site are unopposed.

6. We will grant the Motion to Withdraw the Joint Request, vacate the underlying Order appproving the agreement, dismiss as moot Weppner's Application for Review of that Order, and reinstate the original applications (and the attendant pleadings) dismissed by paragraphs 15-16 of that Order without acting on the further request that ERI be permitted to retain the Doublehead site. In view of the similar issues raised by EVI's and Best's requests that they also be allowed to specify the Mount Morrison site, action on those Petitions would be premature. In this regard, it would be helpful to have the comments of the other applicants and of the Mass Media Bureau concerning (1) the alleged unavailability of the Doublehead Mountain site initially specified by all of the above-captioned applicants (except Lord Broadcasting); (2) whether ERI, Best-Evergreen, and/or EVI have reasonable assurance of the new site; (3) the efforts of each of the applicants that initially specified the Doublehead Mountain site to secure a new site; and (4) whether these matters affect the short-spacing issue against Lord Broadcasting.

7. It would also be helpful to have parties' comments on the comparative issue in view of *Royce International Broadcasting*, FCC 90-390 ¶ 4-11 (released November 27, 1990). For this reason, the Motion For Leave to File Supplement Application for Review, filed November 7, 1990, by Evergreen Broadcasting Company will be dismissed with leave to being refiled at the time for filing the above-described Comments.

8. ACCORDINGLY, IT IS ORDERED, Pursuant to delegated authority under 47 C.F.R. § 0.251(f) of the Commission's rules, that the Motion to Withdraw Joint Request for Approval of Settlement Agreement; To Dismiss Application for Review; and To Withdraw the Ownership Amendment IS GRANTED to the extent reflected in paragraph 5 above; that the Joint Request For Approval of Settlement Agreement IS DISMISSED; that the Application for Review, filed November 1, 1989 by Eileen Weppner IS DISMISSED as moot; that *Evergreen Broadcasting Company*, 4 FCC Rcd 8224 (OGC 1989) IS VACATED; and that the applications (and the related pleadings) dismissed in paragraphs 15-16 of that Order ARE REINSTATED.

9. IT IS FURTHER ORDERED, That the above-captioned applicants and the Mass Media Bureau MAY FILE Comments not to exceed ten (10) pages on the matters discussed in paragraphs 6-7, above within fifteen (15) days of the release of this Order and that Oppositions not to exceed ten (10) pages MAY BE FILED ten (10) days thereafter;[2] and that the Motion for Leave to Supplement Application for Review and Supplement to Application for Review, filed November 7, 1990, by Evergreen Broadcasting Company IS DISMISSED with leave to be refiled.

FEDERAL COMMUNICATIONS COMMISSION

Robert L. Pettit
General Counsel

By John I. Riffer
Associate General Counsel

FOOTNOTES

[1] The following responsive pleadings are also before the Commission: (a) Oppositions, filed November 16, 1989 by ERI and ECC, and by the Mass Media Bureau; (b) a Reply, filed December 4, 1989 by Eileen Weppner; (c) a Motion for Leave to Submit Reply Pleading and Motion for Leave to Submit Reply Pleading In Excess of Page Limitation, filed December 4, 1989 by Eileen Weppner; and (d) Consolidated Opposition to both motions, filed December 14, 1989 by the Mass Media Bureau.

[2] Given the age of this protracted proceeding, further extensions of time are not contemplated.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-236

In re Applications of

Fenwick Island Broadcast Corporation & Leonard P. Berger d/b/a FENWICK ISLAND BROADCAST LIMITED PARTNERSHIP I	File No. BPH-850712ZD
FENWICK ISLAND COMMUNICATIONS, INC.	File No. BPH-850712ZE
GLORIA J. FERNANDEZ-PEREYO MERRYMAN	File No. BPH-850712ZF

For Construction Permit for a New FM Station at Fenwick Island, Delaware

ORDER

Adopted: February 20, 1991; Released: February 21, 1991

1. While exceptions to an initial decision were pending before the Review Board, the above-captioned applicants for a new FM station to be operated on channel 221A (92.1 MHz) at Fenwick Island, Delaware reached a settlement with non-parties William L. Collins, III and Michael T. Scanlon. To effectuate the settlement, Gloria J. Fernandez-Pereyo Merryman (Merryman) sought to amend her application to change its ownership structure from that of an individual to a new entity comprised of Merryman, Scalon, and Collins. On March 14, 1990, the Review Board approved the settlement and accepted Merryman's amendment. *Fenwick Island Broadcast Limited Partnership I*, 5 FCC Rcd 1986 (Rev. Bd.), recon. denied, 5 FCC Rcd 3695 (Rev. Bd. 1990).

2. By virtue of an application for review filed by Linda Tarr-Whelan and Alan Zack, who did not previously participate in this proceeding, the Board's approval of the settlement has not become final. Pursuant to a provision of the settlement agreement permitting any party to terminate the agreement if the order approving the settlement agreement did not become final by December 5, 1990, Messrs. Scanlon and Collins have elected to terminate the agreement.

3. By their Joint Request for Leave to Withdraw Settlement, filed February 1, 1991, Fenwick Island Broadcast Limited Partnership I (Fenwick Island LP), Fenwick Island Communications, Inc. (FIC), and Gloria J. Fernandez-Pereyo Merryman (Merryman) seek leave to withdraw the lapsed settlement, restore the above-captioned applicants to the *status quo ante*, and dismiss as moot the pending Application for Review filed by Linda Tarr-Whelan and Alan Zack. The three applicants report that settlement talks have resumed. They therefore request an extension of time until February 28, 1991 to continue their efforts to reach a mutually acceptable settlement agreement terminating this proceeding and to file documents reflecting such settlement. As Messrs. Collins and Scanlon no longer have ownership interests in Merryman's application, Merryman filed a Petition for Leave to Amend on February 1, 1991, seeking to amend her application to reflect their withdrawal and to return her application to its original status as an individual applicant.

4. We will grant the Joint Request For Leave to Withdraw Settlement Agreement except to the extent reflected in paragraph 5 below, dismiss as moot the Application for Review filed by Linda Tarr-Whelan and Alan Zack (as well as all related pleadings),[1] grant Merryman's Petition for Leave to Amend, and accept the amendment restoring her application to its original status as a sole individual applicant. Grant of the Joint Request effectively vacates the Board's *Memorandum Opinion and Order* approving the settlement (*Fenwick Island*, 5 FCC Rcd 1986, released April 20, 1990), thereby reinstating the applications and pleadings dismissed by paragraph 6 of that *Memorandum Opinion and Order* and returning the proceeding to the Board for consideration of the previously dismissed pleadings.

5. To the extent that the Joint Request seeks an extension of time to negotiate a mutually acceptable settlement and to file documents reflecting such settlement, extensions of time to file pleadings are not routinely granted under 47 C.F.R. § 1.46(a). To expedite the resolution of comparative hearings, the Commission recently announced that requests for extension of time filed under the section 1.46(a) standard shall be closely scrutinized to determine if they are supported by a clear showing of good cause. *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, FCC 90-410 at n.34 (Dec. 21, 1990). Here, the parties do not represent that a settlement is imminent. Stating only that negotiations have been initiated in an effort to work out a universal settlement, the three remaining applicants seek "[a]dditional time . . . to reach an agreement in principal and to finalize the details of such an agreement." Thus, it is concluded that the circumstances shown do not constitute a sufficient showing of good cause to warrant grant of the requested extension of time.

6. ACCORDINGLY, IT IS ORDERED, pursuant to the authority delegated under 47 C.F.R. § 0.251(f), that the Joint Request to Withdraw Settlement Agreement, filed February 1, 1991, by Fenwick Island Broadcast Limited Partnership I, Fenwick Island Communications, Inc., and Gloria J. Fernandez-Pereyo Merryman IS GRANTED to the extent reflected in paragraphs 4-5 above.

7. IT IS FURTHER ORDERED, That the following pleadings ARE DISMISSED as moot: (a) the Application for Review, filed June 29, 1990, by Linda Tarr-Whelan and Alan Zack; (b) the Motion for Leave to Submit Reply to Joint Opposition, filed July 26, 1990, by Linda Tarr-

Whelan and Alan Zack; and (c) the Motion for Leave to Submit Reply to the Mass Media Bureau's Opposition, filed July 26, 1990, by Linda Tarr-Whelan and Alan Zack.

8. IT IS FURTHER ORDERED, That the Petition for Leave to Amend, filed February 1, 1991, by Gloria J. Fernandez-Pereyo Merryman IS GRANTED; and that the attached amendment IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

Robert L. Pettit
General Counsel

By John I. Riffer
Associate General Counsel

FOOTNOTE

[1] Linda Tarr-Whelan and Alan Zack filed an application for review on June 29, 1990. A Joint Opposition was filed on July 16, 1990, by Merryman, FIC, Fenwick Island L.P., and Collins. The Mass Media Bureau filed an Opposition on July 16, 1990. On July 26, 1990 Tarr-Whelan and Zack filed a Reply to the Mass Media Bureau's Opposition and a Motion for Leave to Submit Reply to the Mass Media Bureau's Opposition. On the same date, Tarr-Whelan and Zack filed a Reply to the Joint Opposition and a Motion for Leave to Submit Reply to Joint Opposition.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 15, 1991

COMMENTS INVITED ON PETITIONS FOR RECONSIDERATION OF REVISED COMMISSION POLICY FOR EFFECTIVE DATES OF DEPRECIATION RATE CHANGES

Comments are invited on petitions for reconsideration filed by the Southern New England Telephone Company, Southwestern Bell Telephone Company, the United States Telephone Association, the Cincinnati Bell Telephone Company and GTE Service Corporation. The petitioners request reconsideration of the Commission's new policy for establishing the effective dates for a carrier's depreciation rates represcriptions, as enunciated in the Commission's 1990 Depreciation Rate Prescription Order. *See* The Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended for: Alascom, Inc., Continental Telephone Company of Virginia, GTE North, Inc., GTE South, Inc., GTE Southwest Inc., New England Telephone and Telegraph Company, Ohio Bell Telephone Company, Pacific Northwest Bell Telephone Company, South Central Bell Telephone Company, Southern New England Telephone Company, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, and United Inter-Mountain Telephone Company, 6 FCC Rcd 750 (1991).

Copies of these petitions are available for public inspection and copying in Suite 812, 2000 L Street. Copies are also available from Downtown Copy Center, Suite 246, 1919 M Street, N.W., Washington, D.C. (202) 659-8657.

Parties wishing to file comments on the petitions for reconsideration must do so by April 12, 1991. Replies must be filed by April 26, 1991. A copy of the comments and replies should be provided to the Chief, Depreciation Rates Branch.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

OTI CORPORATION,
and its
Shareholders
Transferors,

and File No. ENF-91-01

MCI
COMMUNICATIONS
CORPORATION, and
MCI/OTI
CORPORATION
Transferees.

For Consent to the Transfer of
Control of Overseas Telecommunications,
Inc.

ORDER

Adopted: March 12, 1991; Released: March 14, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On October 11, 1990, OTI Corporation (OTI), MCI Communications Corporation (MCI) and MCI/OTI Corporation (MCI/OTI) (together "the Applicants") filed a series of applications pursuant to Sections 214(a) and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 214(a), 310(d), for consent to transfer control of authorizations held by OTI's wholly-owned subsidiary, Overseas Telecommunications, Inc. (Overseas) in connection with the proposed merger of OTI and MCI/OTI.[1] For the reasons discussed below, we conclude that the proposed transaction will serve the public interest and the applications are granted.

II. BACKGROUND AND TERMS AND CONDITIONS OF THE MERGER

2. MCI is incorporated in Delaware with its principal place of business in the District of Columbia. MCI owns, directly or indirectly, MCI Telecommunications Corporation, MCI International Telecommunications Corporation, MCI International, Inc., Western Union International, Inc., Satellite Business Systems, Inc., Telecom*USA, Inc., SoutherNet of South Carolina, Inc., Teleconnect Long Distance Services and Systems Company, and TS Communications, Inc. MCI also purchased RCA Global Communications, Inc. in 1988 but subsequently consolidated it with its other operations. Through its subsidiaries, MCI provides common carrier communications services in both the domestic and international markets. Its services include voice, data, messaging, facsimile and other enhanced services.

3. MCI/OTI is an indirect, wholly-owned subsidiary of MCI, incorporated in Delaware, which was formed solely for the purpose of acquiring OTI.

4. OTI is a Delaware corporation with its principal offices in Alexandria, Virginia. Through its wholly-owned subsidiary, Overseas, OTI provides international telecommunications common carrier services. Overseas is an operating non-dominant carrier engaged principally in the provision of international private line communication services via satellite and fiber optic cables and holds authorizations, pursuant to Section 214 of the Communications Act, to provide International Business Service (IBS) and associated video services, as well as international television service, to overseas points.[2] Overseas uses both INTELSAT satellite facilities leased from the Communications Satellite Corporation (Comsat) and undersea cable facilities owned by the company jointly with other U.S. and foreign carriers. Overseas has also been authorized, pursuant to Title III of the Communications Act, to construct and operate eighteen international earth stations in the United States (three of which are transborder stations) for the provision of its communications services, as well as one domestic earth station and five point-to-point microwave stations. In 1989, Overseas had total revenues of $14,897,000, with the largest part, $11,996,000, derived from international private line service. In addition, $2,123,000 in revenue came from video service and $778,000 from earth station installation and sales.[3]

5. Pursuant to the Applicants' Agreement and Plan of Merger dated September 13, 1990 (Merger Agreement),[4] MCI/OTI will be merged with and into OTI, with OTI continuing as the surviving corporation under the corporate name "MCI/OTI Corporation" (the Surviving Corporation). All issued and outstanding shares of stock in the Surviving Corporation will be owned by MCI. Following the merger, the licenses and authorizations currently held by Overseas will continue to be held by Overseas as a wholly-owned subsidiary of the Surviving Corporation.

6. On the effective date of the merger (the Effective Date), all shares of OTI common and preferred stock that were issued and outstanding immediately prior to the Effective Date will be cancelled and converted into the right to receive $1.98 per share in cash with no interest. In addition, outstanding options to purchase OTI stock will be cancelled, and the holders of those cancelled options will receive, for each share of OTI stock for which an option was held, a cash payment equal to the positive difference between $1.98 per share minus the exercise price.

7. Applicants state that the Merger Agreement is structured so that there will be continuity in the service currently afforded to the public by both MCI and OTI. To further this objective, the Applicants state that, upon consummation of the merger, all officers and directors of OTI will resign and the officers and directors of MCI/OTI immediately prior to the Effective Date will become the officers and directors of the Surviving Corporation.

8. The closing of the merger is contingent on the fulfillment of several conditions, including approval of the transaction by the common and preferred shareholders of each company voting separately as classes, grant of all necessary approvals by the Commission, expiration of the

waiting period (and any extensions thereof) under the Hart-Scott-Rodino Antitrust Improvements Act of 1976[5] and grant of all approvals by state or foreign regulatory bodies pursuant to applicable laws or regulations.

9. Applicants state that the proposed merger does not raise any anticompetitive concerns and would serve the public interest by strengthening their ability to provide high quality telecommunications services to the public. Applicants maintain that the merger would allow MCI to enhance its international capabilities through the use of the digital satellite and cable networks over which OTI provides international private line services.[6] Applicants also state that GTI will benefit from lower costs associated with the use of MCI's domestic network. Applicants further state that they will both benefit from the reduction of marketing, administrative and overhead costs, and thus benefit the public by offering their services more efficiently and economically and by enhancing the quality of service to the public. Applicants add that the proposed merger will enhance competition in international communications services because it will increase Applicants' ability to compete with large and experienced companies such as AT&T, US Sprint, World Communications, Inc., TRT/FTC Communications, Inc., IDB Communications Group, Inc. Comsat, Houston International Teleport, GTE Spacenet, Geocomm and others as well as resellers of the services of these companies.

III. COMMENTS

10. On November 15, 1990, the Commission gave public notice of the applications and invited comments from interested parties. Comments were timely filed in response to such notice by the United States Telephone Association (USTA). USTA states that it filed the comments not to state any objection to the merits of the proposed merger but to urge the Commission to consider the impact of the merger on what it describes as an increasingly significant aspect of the interstate interexchange marketplace, the use of carrier identification codes (CIC).[8] USTA notes that the Commission recently reported that 817 of the 969 CIC codes available for use had been assigned as of October 31, 1990, and further notes that MCI has more CIC codes under its control (MCI has 19, OTI has 1) than any other entity. USTA, in effect, asks the Commission to consider the problems that the exhaustion of CIC codes would cause in the industry.[9]

11. In joint reply comments, MCI and OTI, noting that USTA had raised no objection to the proposed merger, state their intention to "continue to work within established fora in addressing carrier identification code issues."[10]

IV. DISCUSSION

12. Sections 214(a) and 310(d) of the Communications Act require that we find that the public interest, convenience and necessity will be served by the transfer of control of a company holding Section 214 certificates and Title III radio licenses. Subsumed therein is the requirement that we review, as may be appropriate, the citizenship, character, financial, technical and other qualifications of the transferee applicant.[11] The Bureau concludes that MCI, a long-term Commission licensee and interstate and international communications carrier, satisfies the threshold qualification requirements and has the financial wherewithal and technical expertise to provide service consistent with the public interest.

13. Section 7 of the Clayton Act proscribes the acquisition of the stock, other share capital, or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."[12] The legislative history of Section 7 "illuminates congressional concern with the protection of competition, not competitors, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition."[13] Section 11 of the Clayton Act empowers us with direct enforcement authority over Section 7 in the case of common carriers.[14] The courts have construed this to mean that the requirements of Section 11 and the applicable provisions of the Communications Act "are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs the consequences with other public interest factors."[15] In other words, the Commission is required to consider anticompetitive consequences as one part of its public interest calculus.[16] In making this assessment, the relevant product and geographic markets must be considered.[17]

14. We note initially that the Department of Justice has had an opportunity to review the subject applications as well as filings made pursuant to the Hart-Scott-Rodino Act.[18] It did not object to the proposed merger or otherwise question its lawfulness.[19] We have independently reviewed the material filed pursuant to the Hart-Scott-Rodino Act and have concluded that no basis is provided therein to deny the proposed transaction.

15. There has been no objection raised to the grant of the subject application, nor has any evidence been presented to show that the proposed merger would have anticompetitive effects in any relevant product or geographic market.

16. In establishing competitive carrier policies for international telecommunications common carriers in CC Docket No. 85-107, the Commission concluded that international telecommunications services are properly divided into five product markets: international message telecommunications service (IMTS), non-IMTS, INTELSAT space segment, multi-purpose earth station services and television services.[20] The geographic markets for all international services are delineated on a country-by-country basis.[21] The Commission has determined that neither MCI nor OTI is dominant in any international services market.[22] With respect to the non-IMTS market, OTI's international private line communications and IBS interests combined with MCI's current non-IMTS service offerings, are not of sufficient magnitude to adversely effect competition or give MCI market power.[23] No comments were filed that are inconsistent with this conclusion. Even if we assumed, *arguendo*, that the proposed merger would result in high concentration in the relevant markets, where, as here, entry into those markets is relatively easy, existing competitors could not sucessfully raise prices for any significant period of time.[24] Under these circumstances, the proposed merger raises no anticompetitive concerns relating to the provision of non-IMTS services.

17. The same holds true for international television services. The record before us does not show that MCI's acquisition of OTI's international television service capabilities[25] will result in a substantial lessening of competi-

tion in the provision of such services in any geographic market. Again, no comments were filed that are inconsistent with this conclusion. Our own review of available industry information indicates that there have been some significant developments in terms of competition in the provision of television services in recent years.[26] We anticipate that the proposed MCI and OTI combination will further increase competition in this growing and increasingly diversified international services market.

18. With regard to USTA's comments, the Bureau views the possible shortage of CIC codes as a separate industry-wide issue which is not related to the pending merger.[27] Also, this merger, which only adds one code to the nineteen codes which MCI previously controlled, will not have a significant impact on the carrier code problem in light of the 817 codes which are already assigned.

V. CONCLUSION

19. The record shows that MCI's acquisition of OTI should enhance its ability to provide high quality international telecommunications services to the public, reduce its marketing, administrative and overhead costs and reduce leased facility and access costs for OTI, among other benefits anticipated by Applicants. We perceive no anticompetitive or antitrust consequences resulting from the proposed merger of MCI and OTI. On the contrary, such combination would continue to be subject to vigorous competition with such regulated providers of international non-MTS services as Western Union, TRT Telecommunications, FTC Communications and AT&T as well as providers of IBS service and resellers and enhanced service providers offering innovative non-IMTS services. We find that MCI is legally, technically, financially and otherwise qualified to operate OTI's telecommunications licensee, Overseas Telecommunications, Inc., and that grant of the subject applications for consent to transfer control of OTI to MCI will serve the public interest, convenience and necessity.

VI. ORDERING CLAUSES AND CERTIFICATE

20. Accordingly, IT IS ORDERED that the referenced applications of OTI and MCI for consent to transfer control of authorizations held by OTI's subsidiary ARE GRANTED.

21. IT IS CERTIFIED, pursuant to Section 214(c) of the Communications Act, 47 U.S.C. 214(c), that neither the present nor future public convenience and necessity will be adversely affected by grant of the subject applications.

22. IT IS FURTHER ORDERED that this order shall be effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] The authorizations for which transfers of control are requested were specified in a Public Notice released November 15, 1990, 5 FCC Rcd 6765 (1990) (Public Notice) which is hereby incorporated by reference. Section 214 provides, in pertinent part, that no carrier shall acquire any line unless it first obtains from the Commission a certificate that the present or future public convenience and necessity require such acquisition. Section 310(d) provides generally that no radio construction permit or license shall be transferred without an application to the Commission and its finding that the public interest, convenience and necessity will be served thereby.

[2] Also transferred in this merger will be Atlantic Fiber Optic Corporation, another subsidiary of OTI, which formerly held a Section 214 authorization (File No. I-T-C-87-011) to acquire an indefeasible right of use in capacity on TAT-8 for the provision of voice, data and video to the United Kingdom and France. This authorization was subsequently assigned to Overseas. *See* Letter from George S. Li to Andrew D. Lipman (January 26, 1989).

[3] *See* Applications of OTI Corporation and MCI Corporation and MCI/OTI Corporation for Consent to the Transfer of Control of Overseas Telecommunications, Inc., File No. ENF-91-01 (System Application) at 7.

[4] A copy of Applicants' Merger Agreement can be found in Exhibit 1 of the System Application.

[5] 15 U.S.C. § 18(a).

[6] System Application at 6.

[7] Public Notice, *supra*, 5 FCC Rcd 6765.

[8] Carrier identification codes are three-digit identification numbers used primarily to access the services of long distance carriers.

[9] *See* USTA Comments at 1, 4-5 (filed December 17, 1990).

[10] MCI and OTI's Joint Reply to Comments at 1.

[11] *See* 47 U.S.C. § 308(b), 310(d).

[12] 15 U.S.C. § 18.

[13] Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

[14] 15 U.S.C. § 21.

[15] United States v. FCC, 652 F.2d 72, 88 (D.C. Cir. 1980).

[16] *Id.* at 87, *citing* Denver and Rio Grande W.R.R. v. United States, 387 U.S. 485 (1967).

[17] Brown Shoe Co., 379 U.S. at 324.

[18] 15 U.S.C. § 18(a).

[19] The waiting period allowed by the Hart-Scott-Rodino Act expired on December 27, 1990 without an objection being made by the Department of Justice.

[20] *See* International Competitive Carrier Policies, 102 FCC 2d 812 (1985) (*International Carrier*), *recon. denied*, FCC 86-339 (released July 29, 1986). In that decision, the Commission found that the international telecommunications market is divided into two basic product groupings, IMTS and non-IMTS; it also treated television service as a separate product. *Id.* at 821-22, 839. While not relevant to this case, the Commission also found space segment and multi-purpose earth stations to be separate markets or sub-markets. *Id.* at 838, 839.

[21] *Id.* at 828.

[22] *Id.* at 830, 833, 839-40.

[23] *See* Trends in the International Communications Industry, 1975-1989, Common Carrier Bureau, Industry Analysis Division (October 24, 1990). MCI and its subsidiaries accounted for 55% of the record carrier's revenues in 1989. *Id.* at 8. The record carriers comprise only a portion of the total non-IMTS market.

[24] *See*, Application of General Electric Co., 4 FCC Rcd 8207, 8209 (1989) (citing U.S. Department of Justice Antitrust Guidelines for International Operations).

[25] Overseas holds a Section 214 authorization in the International Television Service (File No. I-T-C-86-163, effective October 8, 1986). *See* System Application, Exhibit 8, at 2. Overseas also held authorizations to lease channels from Comsat to provide international television services. *See* Overseas Telecommunications, Inc., 2 FCC Rcd 1587, 1587 (1987).

[26] We note that tariffs offering international television service have been filed with the Commission by AT&T Communications, Hughes Communications Carrier Services, Inc., IDB Communications Group, Inc., Satellite Transmission and Receiving Company, Southern Satellite Systems, Inc. and others.

[27] We note that at least two workshops concerning the shortage of CIC codes have been conducted under the auspices of the Inter-Carrier Coordinating Forum and that organization, along with the administrator of the North American Numbering Plan, is in the process of developing recommendations for dealing with this problem.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Benton Ridge
Telephone Company

Petition for Waiver of the
Commission's Equal Access
Requirements for Independent
Telephone Companies

MEMORANDUM OPINION AND ORDER

Adopted: March 12, 1991; Released: March 15, 1991

By the Chief, Common Carrier Bureau:

1. In this order, we grant the Benton Ridge Telephone Company (Benton Ridge) a waiver of the Commission's equal access requirements for one year. In the *ITC Equal Access Order*,[1] the Commission required independent telephone companies (ITCs) to convert their end offices to equal access only if certain conditions were present. That order also established a timetable for conversion under certain circumstances. Strict timetables for conversion had been imposed upon the Bell Operating Companies (BOCs) under the Modification of Final Judgment (MFJ),[2] and upon the GTE operating companies (GTOCs) under the GTE Consent Decree. [3] The Commission recognized differences between the BOCs and GTOCs on the one hand, and the non-GTE ITCs on the other, with respect to the types of markets served, switching technologies employed, and financial resources available to undertake equal access conversion. Because of these differences, the Commission concluded that the timetables of the type imposed upon the BOCs and the GTOCs would not be appropriate for the non-GTE ITCs.

2. Instead, the Commission required these ITCs to convert end offices equipped with stored program controlled (SPC) switches within three years of a "reasonable request" for conversion to equal access by an interexchange carrier. The Commission directed the non-GTE ITCs to convert end offices with electromechanical switches as soon as practical but did not specify a timetable.[4] The *ITC Equal Access Order* provided that the non-GTE ITCs may seek a waiver of the Commission's rules if they can "demonstrate that such a timetable, or the provision of such access features, is not feasible except at costs that clearly outweigh potential benefits to users of telecommunications services."[5]

3. Benton Ridge filed its Petition for Waiver (Petition) on June 6, 1989.[6] Benton Ridge states that on March 18, 1988, MCI requested that Benton Ridge convert its facilities to equal access.[7] In its petition, Benton Ridge requests: a permanent waiver of its equal access conversion obligation, or an indefinite waiver of its equal access obligation until "technology is made available which greatly improves the cost/benefit ratio that currently exists" for equal access conversion.[8] Benton Ridge also argues that if it is required to convert, it should be permitted to recover the entire cost of the equal access conversion from its interexchange customers.

4. Benton Ridge contends it is not feasible to convert the Benton Ridge exchange except at costs that outweigh potential benefits. Benton Ridge contends that the provision of equal access would result in serious hardship to Benton Ridge and its customers. In support of these contentions, Benton Ridge states that it would cost more than $96,000 to convert the Benton Ridge exchange, or almost $240 per subscriber.[9] Benton Ridge states that the bulk of the conversion cost ($81,585 or 84.7%) arises from the need to install, for billing purposes, a Cook Billing Media Converter II (BMC). Benton Ridge states that it is an average schedule company, and that the cost of a BMC, as a network reconfiguration cost, is not compensable under the interstate average schedules.

5. MCI disagrees with Benton Ridge's statement that a BMC is necessary for conversion to equal access. MCI argues that interexchange carriers are already being billed for switched access by Benton Ridge -- presumably through another local exchange carrier. MCI states that the BMC network reconfiguration upgrade, which would have the effect of permitting Benton Ridge to bill interexchange carriers directly, may not be necessary if the entity that is currently billing switched access will continue to provide billing services for the Benton Ridge exchange.[10]

6. In response, Benton Ridge states that, according to its switch vendor, the BMC is necessary for Benton Ridge to comply with the MCI request. Benton Ridge also states that it believes it must do its own billing in order to assure accurate bills in an equal access setting.

7. We are unconvinced by the justification offered by Benton Ridge to support its waiver request. In its attempt to show that the costs of equal access conversion outweigh the benefits, Benton Ridge relies heavily on its contention that a BMC, which accounts for almost 85% of the estimated costs, is necessary for equal access conversion. Benton Ridge has failed, however, to rebut MCI's contention that the BMC is not necessary to convert the Benton Ridge exchange to equal access. Benton Ridge has not explained how billing services are currently provided, and has not demonstrated that the present billing mechanism would not be adequate after conversion to equal access. Given the existing record, we are unable to conclude that the costs described by Benton Ridge would necessarily result from the required equal access conversion. Indeed, it appears that Benton Ridge may have overstated the costs of equal access conversion by more than 500 percent. Without the BMC, the total cost per subscriber drops to $36.33.[11] We conclude that Benton Ridge has not demonstrated that the costs of converting the Benton Ridge exchange to equal access outweigh potential benefits. Accordingly, based on the record before us we must deny Benton's requests for a permanent or indefinite waiver of the equal access requirements.

8. We also deny Benton Ridge's request that it be permitted to recover all of the costs it identifies as resulting from of the equal access conversion from its interexchange customers. As noted above, Benton Ridge has not established that the BMC ($81,585) is necessary to comply with MCI's equal access request.

9. The Commission has determined, for purposes of jurisdictional separations and Part 69, that equal access costs include:

> only initial incremental presubscription costs, and initial incremental expenditures for hardware and software related directly to the provision of equal access which would not be required to upgrade the switching capabilities of the office involved absent the provision of equal access.[12]

The average schedule formula for the compensation of average schedule companies include supplemental payments for equal access costs that are consistent with the separations definition.[13] That formula would provide Benton Ridge with compensation for the interstate portion of conversion costs other than the BMC. Benton Ridge has not demonstrated any reason for departing from the established formula.

10. Nevertheless, we will grant Benton Ridge a limited, one year waiver of the equal access requirement. Benton Ridge is required to complete equal access conversion by March 18, 1992. This waiver will permit Benton Ridge, if it chooses, to make a second attempt to demonstrate that the provision of equal access is not feasible except at costs that clearly outweigh potential benefits to users of telecommunications services. In order to provide sufficient time to evaluate such a waiver request, Benton Ridge must file such a petition on or before May 15, 1991.[14] In the event that Benton Ridge does not choose to make such a filing, it will have sufficient time to provide equal access in accordance with the MCI request.

11. ACCORDINGLY, pursuant to the authority that is contained in Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, IT IS ORDERED THAT a waiver of the equal access requirements IS GRANTED for one year and that Benton Ridge's petition IS OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase II, 100 FCC 2d 860 (1985)(*ITC Equal Access Order*).

[2] *United States v. American Tel. & Tel. Co.*, 552 F. Supp 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983).

[3] *United States v. GTE Corp.*, 603 F. Supp. 730 (D.D.C. 1984).

[4] *See ITC Equal Access Order* at paras. 48-49.

[5] *Id.* at paras. 48-49.

[6] Formal comments were filed by: the American Telephone and Telegraph Company (AT&T), MCI Telecommunications Corporation (MCI), the Public Utility Commission of Ohio, and the United States Telephone Association. Reply comments were filed by Benton Ridge and the National Telephone Cooperative Association. With the exception of MCI and AT&T, the formal comments supported Benton Ridge's petition. Letters expressing support for the Benton Ridge petition, including a letter from the Hon. Michael G. Oxley (Representative from the 4th U.S. Congressional District of Ohio), were also filed. Those letters have been treated as informal comments in this proceeding.

[7] Petition at 4. The Benton Ridge Telephone Company owns three exchanges in northwestern Ohio. The Benton Ridge exchange, with 406 access lines, is served by a Northern Telecom DMS-10 stored program controlled switch. The New Bavaria exchange (400 access lines) and the North Creek exchange (180 access lines) are served by Stromberg XY electromechanical switches. Benton Ridge states that it believes MCI's request for equal access only applies to the Benton Ridge exchange. Petition at 2. MCI does not dispute Benton Ridge's conclusion.

[8] *Id.* at 7.

[9] *Id.* at 4. Benton Ridge initially contended that a local rate increase of $6.00 would be required to cover the costs of equal access conversion, but subsequently reduced that estimate to $5.00. *Id.* at 6; Benton Ridge Reply at 7.

[10] MCI Comments at 2-3; Benton Reply Comments at 4-5 and Attachment 1.

[11] ($96,336 - $81,585)/406 = $36.33.

[12] MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, Recommended Decision and Order, Mimeo No. 138 at para. 1 (released Oct. 8, 1985), 50 F.R. 47765 (Nov. 20, 1985); Decision and Order, FCC 86-6 (released Jan. 7, 1986), 51 F.R. 2708 (Jan. 21, 1986)(Defining equal access costs for separations purposes); MTS and WATS Structure, Amendment of Part 69 of the Commission's Rules for Recovery of Equal Access Costs, CC Docket No. 78-72, Report and Order, 4 FCC Rcd 2104 (1989)(Defining equal access costs for purposes of a separate Part 69 rate element).

[13] The interstate portion of the costs of the software conversion that is required for equal access implementation and the initial pre-subscription and balloting costs are subject to special reimbursement under the average schedules. Other costs and expenses are incorporated in the basic average schedules.

[14] Benton Ridge shall serve copies of its filing, with all supporting documentation, upon all parties to this proceeding, and shall file five (5) copies of its filing with supporting documentation with the Policy and Program Planning Division, Common Carrier Bureau, Federal Communications Commission, Room 544, 1919 M Street, N.W., Washington, D.C. 20554.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
March 6, 1991

Released: March 22, 1991

Jacksonville Educators Broadcasting, Inc.
c/o Colby M. May, Esq.
May & Dunne, Chartered
1000 Thomas Jefferson Street, N.W.
Washington, D.C. 20007

8940-AG

Dear Mr. May:

This is in reference to your petition for reconsideration, filed on behalf of Jacksonville Educators Broadcasting, Inc. (Jacksonville), regarding the Commission's decision released October 18, 1990, which dismissed the application (BALET-900508KE) for consent to assign the license of television station WETV, Channel 13, Key West, Florida, from Palmetto Broadcasters Associated for Communities, Inc. (Palmetto) to Jacksonville. *Palmetto Broadcasters Associated Communities, Inc.*, 5 FCC Rcd 6379 (1990). You contend that the Commission's action is arbitrary and capricious because it violated Section 316 of the Communications Act. In addition, you argue that the Commission's action involving Channel 13 deprives the Key West community of its only authorized operating television station. You thus contend that, pursuant to Section 307(b) of the Act, "the Commission should provide a substitute channel for noncommercial service to Key West to replace the assignment of Channel 13 for use" by the United States Information Agency.

Your petition for reconsideration of the Commission's action is untimely. The Commission therefore has no authority to entertain your petition.[1] Further, by its letter dated October 26, 1990, Palmetto voluntarily surrendered its license to the Commission for cancellation. Accordingly, the Commission's action denying the assignment application is now moot. Finally, because Palmetto has surrendered its license, the relief you requested (modification of Palmetto's license) cannot be granted. It therefore appears you have no standing in this matter.

In view of the foregoing, your petition for reconsideration IS DISMISSED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

cc: David E. Hilliard, Esq.
Wiley, Rein & Fielding

FOOTNOTES

[1] *See* U.S.C. §405; *Reuters Limited v. FCC*, 781 F.2d 946 (D.C. Cir. 1986). The Commission's *Memorandum Opinion and Order* was released on October 18, 1990 and the deadline for petitions for reconsideration was November 19, 1990. Jacksonville's petition for reconsideration was untimely filed on November 21, 1990. In its petition, Jacksonville asserts that, although the Commission's decision bears an October 18, 1990 release date, the Commission's *Memorandum Opinion and Order* was in fact released on October 19, 1990. Jacksonville provides no substantiation for its assertion, and Commission records verify that copies of the decision were placed on the press table and publicly released on October 18th. *See* 47 C.F.R. §1.4(b)(2).

[2] We note that our action denying the assignment application did not deprive Key West of local television services, nor did it modify Palmetto's license. We further note that Channels 8 and 22 are also allocated to Key West. In that regard, a construction permit has been issued for Channel 22 (Penny Drucker; BPCT-870331GK, granted January 20, 1988), and a construction permit application for Channel 8 has been approved, though the authorization has not yet been issued (Hispanic Keys Broadcasting Corp., BPCT-850917KF).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IRWIN WALLACE,
d/b/a WALLACE
COMMUNICATIONS
CONSULTANTS, and
DREW METAL
CORPORATION,
Complainants,

v. File No. E-88-116

AT&T COMMUNICATIONS
OF THE SOUTHERN
STATES, INC.,
and AMERICAN
TELEPHONE AND
TELEGRAPH COMPANY,
Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 1991; Released: March 22, 1991

By the Commission:

1. Irwin Wallace, d/b/a Wallace Communications Consultants, and Drew Metal Corporation (hereinafter, collectively "Wallace") filed the above-captioned complaint against AT&T Communications of the Southern States, Inc., and American Telephone and Telegraph Company (hereinafter, collectively "AT&T"). Wallace alleges that AT&T violated Sections 203(a), (b), (c), and 205(a) of the Communications Act[1] by charging other than the published interstate tariff rates for a 10-month period from June 1, 1985, to April 24, 1986.[2] The complaint was filed as a result of a court referral, based on primary jurisdiction, by the United States District Court, Middle District of Florida, Tampa Division (Case No. 87-1093-Civ-T-15(c), July 14, 1988). For the reasons discussed below, we find that AT&T's actions violated the Communications Act.[3]

BACKGROUND AND CONTENTIONS OF THE PARTIES

2. Plaintiffs allege that on March 10, 1986, defendants filed a revision to interstate tariffs F.C.C. Nos. 1 and 2 providing for a gross receipts tax surcharge (GRTS) of 1.5 percent on the total interstate telecommunications services provided and billed by AT&T to its Florida customers. According to Wallace, although this tariff did not go into effect until April 24, 1986, AT&T began charging and collecting the surcharge about June 1, 1985. Wallace contends that Section 203(a) of the Communications Act, 47 U.S.C. § 203(a), requires AT&T to include within its FCC tariffs all charges for interstate communication service, that Section 203(b) prohibits AT&T from changing any of the charges in its tariff without proper notice to the Commission and the public, that Section 203(c) prohibits AT&T from charging customers a different amount than the charges specified in its tariff, and that Section 205(a) provides that when the FCC has prescribed charges for defendants, defendants are prohibited from publishing, demanding, or collecting any charge other than the one prescribed by the Commission and are required to adhere to the rates and charges prescribed. Wallace concludes that by charging its customers the GRTS prior to the date the revised tariff became effective, AT&T violated all of the above sections of the Communications Act. Therefore, Wallace asserts, AT&T is liable to plaintiffs for injuries caused by the violations, which consist of the amounts paid for the GRTS as well as other damages, including reasonable attorney fees and the costs of the case.[4]

3. AT&T argues that it did not violate the Communications Act. It states that the Florida utility gross receipts tax statute expressly permits AT&T to pass on the tax to its Florida customers as a line item and that the tax is a fixed percent of the amount billed to end users. Therefore, concludes AT&T, "for purposes of the Communications Act, the Florida tax has the same effect as the federal excise tax and the many state sales and excise taxes that are measured by AT&T's interstate gross receipts and imposed directly on the customer (with AT&T under a collection duty)." Answer at 7. AT&T asserts that such excise and sales taxes can be collected without tariff authority. In addition, AT&T argues that there is no reason to require federal tariffing before it may flow through taxes to customers in accordance with state or federal laws that impose the tax. It maintains that to require carriers to tariff each state and local tax and to revise the tariff each time the tax is changed would unnecessarily burden both carriers and the Commission. Moreover, according to AT&T, Section 203 does not require tariffing of activities which are extrinsic to the communications services regulated by the Commission, such as the collection of a tax which Florida allocated to its own residents. In answer to complainants' reliance on the fact that AT&T later tariffed the Florida gross receipts tax flow through, AT&T explains that although the tariff was not required, it filed an interstate tariff detailing its treatment of the gross receipts tax imposed by Florida in conjunction with its general flow through tariff, dealing with those states that did not provide specific flow through authority, to avoid any confusion as to whether the Florida tax was covered. Finally, AT&T argues that the Communications Act does not authorize the Commission to award attorneys' fees and that plaintiffs' request for such damages must be denied.[5]

4. Complainants counter that the Florida gross receipts tax is a tax on AT&T, not a tax on its customers, the end users; as to the customers, it is a surcharge imposed by AT&T.[6] Complainants argue that the fact that AT&T can recover (flow through) the effects of the tax from the Florida end users does not change the character of the tax to that of an excise or state sales tax. They contend that because the flow through provision of the Florida statute is permissive, not mandatory, "it inherently provides for compliance with any other limitations -- practical, legal, regulatory or other -- which might supersede or otherwise impair the service provider's ability to recover the tax burden using the optional flow-through method." Reply at 7-8. According to complainants, both FCC policy and

the Communications Act are potential impediments to the optional flow through provision. They argue that the flow through provision of the Florida statute does not supersede the FCC's tariff policies, it just makes them compatible. An examination of a Florida telephone bill shows that the gross receipts tax surcharge is itself subject to state sales and federal excise taxes. These and other factors lead complainants to conclude that the Florida gross receipts tax surcharge does not resemble state and federal end user taxes. Finally, complainants argue that the surcharge is not "extrinsic" to the communications services regulated by the FCC, "but is one element of many rate regulated expenses 'affecting the charges' for AT&T's tariffed services." Reply at 11.

5. In its complaint, Wallace also requests that the Commission rule that no part of the claim is barred by the statute of limitations. AT&T states that although the complaint alleges that AT&T started charging and collecting the GRTS about June 1, 1985, complainants did not file the complaint in the United States District Court until July 31, 1987, more than two years later. AT&T concludes that, depending on the billing dates, Section 415(b) of the Act, 47 U.S.C. § 415(b), bars all or part of the claims. AT&T rejects complainants' argument that Section 415(d) extends the statutory period from two years to two years and ninety days.[7] AT&T interprets Section 415(d) to insure that a party has at least ninety days to bring suit after a carrier has begun an action or collected overdue charges. According to AT&T, since complainants had considerably more time than that to bring an action, Section 415(d) is inapplicable.

DISCUSSION

6. We do not agree with AT&T's contention that the Florida gross receipts tax need not be tariffed because it "has the same effect as the federal excise tax and the many state sales and excise taxes . . . imposed directly on the customer . . . ." Answer at 7.[8] To the contrary, the Florida statute makes it clear that its gross receipts tax is a tax on the telecommunications carrier, not on the end-user.[9] Therefore, the tax is not "extrinsic" to the communications services regulated by this Commission, as argued by AT&T, but is one of many expenses affecting the carrier's charges to its customers.[10] Accordingly, AT&T has not supplied any basis for not tariffing its gross receipts tax surcharge, and we find that its imposition of a gross receipts tax surcharge on the end user before the tariff authorizing such a charge became effective was a violation of Section 203 of the Act.[11]

7. Turning to the statute of limitations argument, we agree with AT&T that the purpose of Section 415(d) of the Communications Act, 47 U.S.C. § 415(d), is to ensure that a customer has at least ninety days to bring suit after a carrier has begun an action or collected charges. Section 415(d) does not automatically extend the statutory period to two years plus ninety days. It extends the filing period **"to include ninety days from the time [the] charges are collected by the carrier."** AT&T collected the charges complained of for approximately ten months beginning about June 1985. The ninety days from the time AT&T collected the unlawful charges had passed long before the end of the two-year statutory period provided for in Section 415(b) and (c).[12] Therefore the two-year period is not extended by Section 415(d). As a result, the complainants' claims for damages are barred to the extent they seek to recover charges alleged to have occurred beyond the two-year period of limitations specified in Section 415. *See, e.g., Aetna Life Insurance Company v. AT&T,* 3 FCC Rcd 2126 (Com. Car. Bur. 1988).

CONCLUSION AND ORDERING CLAUSES

8. For the reasons discussed above, we conclude that although it was proper for AT&T to flow through the Florida gross receipts tax to its Florida customers,[13] it should not have done so until its tariff providing for the GRTS flow through went into effect. Therefore, its flow through of the GRTS from about June 1, 1985 until the appropriate tariff became effective on April 24, 1986, was unlawful. However, any damages that might have accrued for charges imposed by AT&T beyond the two-year period of limitations specified in Section 415 are barred.

9. Accordingly, IT IS ORDERED that the complaint filed August 22, 1988, by Irwin Wallace, d/b/a Wallace Communications Consultants, and Drew Metal Corporation IS GRANTED to the extent indicated above and IS DENIED in all other respects.

10. IT IS FURTHER ORDERED that the motions listed in footnote 3 ARE DENIED.

11. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order be mailed forthwith to the Honorable William J. Castagna, Judge, United States District Court, Middle District of Florida, Tampa Division.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 47 U.S.C. §§ 203(a)-(c) & 205(a).

[2] It is undisputed that, effective April 24, 1986, the subject charges were published pursuant to AT&T's Tariffs F.C.C. Nos. 1 and 2.

[3] Plaintiffs have filed various motions involving discovery or admissions (Motion to Compel Complete Response to Plaintiffs' First Set of Interrogatories, Motion of Complainants for Leave to Serve Document Requests and Requests for Admission, Motion for Leave to Serve a Second Set of Requests and a Post-Discovery for Admissions Brief Containing Proposed Findings of Fact and Conclusions of Law) as well as a letter dated October 5, 1990, enclosing a copy of an AT&T pleading in another matter, and citing recent decisions, which, according to plaintiffs have a bearing on the instant matter. AT&T has responded to all of these pleadings. We deny these motions and will not consider the additional arguments contained in the October 5, 1990, letter. After a status conference on December 20, 1988, AT&T agreed to supply certain information to plaintiffs. If there are any unanswered interrogatories or requests for admission still pending, the requested information is unnecessary for our resolution of the case, since only the legal implications, but not the facts, surrounding AT&T's actions are in dispute.

In a footnote in its Reply to Answer, complainants also "urge the Commission to investigate the motivation underlying AT&T's defenses and, if found to have been made in bad faith

and in breach of its candor obligations to this Commission, assess fines and forfeitures pursuant to Section 205(b)." Reply at 5, n. 13. We will not consider this request since it was first raised in complainants' reply. Although ordinarily a complainant would not be in a position to attack the motivation behind defendants' defenses until after the answer to the complaint was filed, in this instance the parties have filed numerous pleadings in the court action and were aware of the main arguments of the other party. Absent compelling evidence of misconduct, which Wallace has failed to introduce, we will not consider this new issue raised in the reply.

[4] Plaintiffs, who originally brought this action as a private class action suit in the United States District Court, Middle District of Florida, Tampa Division, are looking to that court, which retained jurisdiction, for the award of damages and costs.

[5] Since plaintiffs are relying on the court for the award of all damages, we will not reach this issue.

[6] In support, Wallace cites an article by Dr. Robert Self which criticizes AT&T's tariffs for referring to a gross receipts tax surcharge as a tax. According to Dr. Self, such a charge is not a tax, but a surcharge. Taxes, according to Dr. Self, are not subject to the federal excise tax, whereas surcharges are.

[7] Section 415 provides, in pertinent part:

> (b) All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section.
>
> (c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section . . . .
>
> (d) If on or before the expiration of the period of limitation in subsection (b) or (c) a carrier begins action under subsection (a) for recovery of lawful charges in respect of the same service, or without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

[8] Federal excise taxes and sales taxes are taxes on the end user, not on the carrier. As a result, those taxes are not an expense of the carrier in doing business in the state, and are not tariffed.

[9] Pertinent parts of 203.63 of the Florida Utility Code, Gross Receipts Taxes, provide as follows:

203.63 Tax on interstate and international telecommunication services.

> (1) The tax imposed pursuant to this part relating the provision of any telecommunication services . . . at the option of the person supplying the taxable services may be separately stated as Florida gross receipts tax on the total amount of any bill, invoice, or other tangible evidence of the provision of such services and may be added as a component part of such charge. . . .
>
> (2) The tax is imposed upon every person for the privilege of conducting a telecommunication business, and each provider of the taxable services remains fully and completely liable for the tax, even if the tax is separately stated as a line item or component of the total bill.

[10] AT&T's argument that it would unnecessarily burden both carriers and the Commission to require them to tariff each state and local tax and to revise the tariff each time the tax is changed is misplaced. As noted above, carriers are not required to tariff all state and local taxes, but only those levied directly on them as an expense of doing business. Filing a revised tariff in this instance is no more burdensome than revising any other tariff when expenses change.

[11] Complainants also allege that defendants violated Section 205(a) of the Act, 47 U.S.C. § 205(a), by demanding and collecting a charge other than that prescribed by the Commission. Complainants, however, provide no evidence to show that the Commission has, in fact, prescribed any rate or rates at issue in the instant complaint. Thus, there is no basis for a finding that AT&T's collection of a gross receipts tax surcharge prior to tariffing it violated any outstanding Commission prescription pursuant to Section 205(a).

[12] Section 415(b) establishes a two-year limitation period for the recovery of damages not based on overcharges. Section 415(c) establishes a two-year limitation period for the recovery of damages based on overcharges. Although AT&T states that Section 415(b) applies in this instance, it would appear that the appropriate section is Section 415(c).

[13] *See, e.g.*, Connecticut Office of Consumer Counsel v. AT&T Communications, 4 FCC Rcd 8130 (1989), *aff'd sub nom.* Connecticut Office of Consumer Counsel v. FCC, 915 F.2d 75 (2d Cir. 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 8, 1991

COMMON CARRIER BUREAU SEEKS COMMENTS ON PRICE CAP SERVICE QUALITY AND INFRASTRUCTURE MONITORING

Pleading Cycle Established

In the *LEC Price Cap Order*, the Commission delegated to the Chief, Common Carrier Bureau, authority to establish new reporting requirements designed to capture trends in service quality and telephone industry infrastructure development under price cap regulation, and improve and standardize existing reporting requirements for this purpose. Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, CC Docket No. 87-313, 5 FCC Rcd 6786, 6827-30 (1990) (*LEC Price Cap Order).* We now seek comment on our proposed reporting requirements.

The Commission determined that local exchange carriers (LECs) for whom price cap regulation is mandatory[1] will be required to complete all but two of the semiannual service quality information requirements originally required only of the Regional Bell Operating Companies (RBOCs). The mandatory price cap LECs will also be required to submit infrastructure reports annually, and all price cap LECs (including LECs that elect to be covered by the price cap rules) will be required to submit quarterly service quality reports.

The Commission found that two of the information requirements to be included in the quarterly service quality reports would duplicate data gathered in the semiannual reports. The Commission directed that, in order to avoid redundancy, the trunk blockage and installation interval information requirements should be eliminated from the semiannual reports. *LEC Price Cap Order*, 5 FCC Rcd at 6828, para. 342. The Bureau believes that the Commission's concern about collecting information that is redundant is not implicated when reporting requirements are complementary rather than duplicative. For example, the particular reporting requirements appended to this Public Notice include blockage information that would complement, but not duplicate, the semiannual reports. We invite comment on the use of this complementary data collection and whether it serves the Commission's goal of capturing trends, without thwarting the Commission's goal of avoiding redundancy in reporting requirements.

The service quality and infrastructure data collected will be placed in new reports within the Automated Reporting Management Information System (ARMIS). It is our intention that, for maximum convenience and efficiency, these reports will be filed with both the Accounting and Audits Division, which maintains the ARMIS database, and the Industry Analysis Division, which analyzes these and other service quality-related reports. The final formats and specifications of these reports will be developed by the Bureau's staff working in cooperation with interested parties. The tables in the attachments to this Public Notice are intended to illustrate the information we propose to collect in these reports, not any particular format. The tables in Attachment A represent proposed quarterly service quality reports. Attachment B contains proposed modifications to the Bureau's current semiannual reports, and Attachment C represents our proposed infrastructure reports. Attachment D contains a copy of Appendix B of the *BOC ONA Reconsideration Order*,[2] showing service categories for installation and repair interval reporting required in that proceeding. Several parties have proposed that we use these service categories in our quarterly reporting requirements on installation intervals and repair intervals, and we solicit comment on this proposal.

The attached reports respond, in some particulars, to concerns raised in the course of the Commission's LEC price cap proceeding. For example, in an effort to address the concerns of rural end users, we have included some reporting that disaggregates Metropolitan Statistical Areas (MSAs) from non-MSAs. [3] We have also included transmission quality reporting that applies to data transmission, since our existing transmission quality reports concern principally voice transmission.[4] We have not addressed the requests of smaller LECs that are regulated under price caps through their affiliation with larger mandatory or electing companies, or that wish to elect caps in the future, to provide lesser filing requirements for them. Until such time as the Commission addresses these concerns directly, on reconsideration of the *LEC Price Cap Order* or in a separate proceeding, we will expect all price cap LECs to file the required data, absent a waiver of this requirement.

We are particularly concerned that our requirements be clear and usable, and that the reports we request be reasonably designed to allow the Commission and interested parties to gain a meaningful overview of LEC service quality and infrastructure development under price caps. To that end, we invite comments particularly on our definitions and explanations of the measurements solicited. We note, for example, that our fiber data on Infrastructure Reports Table II might fit other categories better than those we propose here, Fiber to Buildings and Fiber to Customers. Further, we request comment on indicators we are considering but which we have not yet incorporated into the reports. For example, we might include a separate category in the switching equipment table of the infrastructure report to allow for isolating data pertaining to remotes (which are presently included in the "total switching entities" count). We might also consider collecting data on access tandems, which are explicitly excluded from the present reports, by technology type, number of trunks, or other classifications.

In developing these reporting requirements, the Bureau has attempted to balance the need for data that will accurately reflect trends in service quality and infrastructure development with our goal of minimizing the administrative costs of LECs. Parties are encouraged to participate in this proceeding so that we may develop reporting requirements that strike the most appropriate balance between these considerations. This will be treated as a non-restricted proceeding; *see* 47 C.F.R. §1.1206. We note that the pleadings filed in the Commission's reconsideration proceeding on the *LEC Price Cap Order* are incorporated in this record to the extent that they deal

with service quality and infrastructure development. Interested parties may file comments on the Bureau's proposed reporting requirements no later than April 10, 1991. Reply comments may be filed no later than April 25, 1991. We plan to release an Order specifying reporting requirements in time for price cap carriers to complete and file their initial reports on July 1, 1991.

An original and four copies of all comments and replies must be filed with the Secretary of the Commission in accordance with Section 1.51(c) of the Commission's Rules. Parties must also furnish one copy of their comments and replies to Downtown Copy Center, the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington D.C. 20554, and six copies to the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

FOOTNOTES

[1] The mandatory price cap LECs are GTE Service Corporation (GTE), and the Regional Bell Operating Companies (RBOCs); Ameritech Operating Companies (Ameritech); Bell Atlantic Telephone Companies (Bell Atlantic); BellSouth Telephone Companies (BellSouth); New England Telephone and Telegraph Company and New York Telephone Company (together, NYNEX); Pacific Bell and Nevada Bell (together, Pactel); Southwestern Bell Telephone Company (Southwestern Bell, or SWB); and US West Communications, Inc. (US West).

[2] Filing and Review of Open Network Architecture Plans, 5 FCC Rcd 3084, 3096 (1990) (*BOC ONA Reconsideration Order*).

[3] We invite comment on whether this disaggregation should be continued still further, perhaps according to the Department of Commerce classifications of Level A MSAs (over 1 million population), Level B MSAs (250,000 to 1 million), Level C MSAs (100,000 to 250,000), and Level D MSAs (50,000 to 100,000).

[4] We invite parties to propose definitions and measurements for these reports. We also seek comment on the proposal of some parties that LECs include in their tariffs a notation of the service they will provide with regard to availability and bit error rate, two indicators of data transmission quality.

SERVICE QUALITY REPORT

COMPANY:
STUDY AREA:
PERIOD:
COSA:

Table 1
Installation Intervals

	Switched Access[1]	Special Access[2]
Total Number of Orders[3]		
Percentage of Commitments Met[4]		
Average Missed Commitment[5]		

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1 Circuit from the local exchange carrier (LEC) Office to the interexchange carrier (IC) Point of Presence (POP) for Feature Group B, C, or D interLATA service. This definition applies throughout this report.

2 Circuit from the LEC facilities to the IC POP for voice grade service, WATS/800, metallic and telegraph services, audio or video program services, wideband services, DDS, high-capacity, DS1, DS3, and switched Feature Group A services. This definition applies throughout this report.

3 Total number of installation orders or circuits, classified by switched or special access, provided during the period of this report. This number excludes installation orders and circuits not completed by the commitment date because the customer was not prepared to receive service on that date.

4 Number of installation orders completed by the commitment date divided by the total number of orders provided during this period. The "commitment dates" for various kinds of installations are published by the LECs and must be kept on file with the Commission, or are established through negotiation on an individual case basis.

5 The average interval, expressed in days, between the commitment date and the day the service or order was completed, for all commitments not met during the period of this report. This is recorded by some carriers as "delay days."

SERVICE QUALITY REPORT

COMPANY:
STUDY AREA:
PERIOD:
COSA:

Table 2
Repair Intervals

	Switched Access	Special Access
Total Number of Trouble Reports[1]		
Average Interval[2]		

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1 Total number of circuit-specific trouble reports referred to the LEC during the period of this report.

2 The average interval from the time of LEC receipt to the time of acceptance by the IC control office.

SERVICE QUALITY REPORT

COMPANY:
STUDY AREA:
PERIOD:
COSA:

Table 3
Trouble Reports

	Number of Access Lines	Number of Initial Trouble Reports[1]	Number of Repeat Trouble Reports[2]	Number of "No Trouble Found"
MSA Business				
Non-MSA Business				
MSA Residential				
Non-MSA Residential				
Total				

1 Trouble reports are complaints concerning service quality made by customers or end users to LECs.

2 Trouble reports occurring when a trouble recurs within 30 days of the initial trouble report.

SERVICE QUALITY REPORT

COMPANY:
STUDY AREA:
PERIOD:
COSA:

Table 4
Trunk Blockage

	Month 1[1]	Month 2[2]	Month 3[3]
Total Trunk Groups[4]			
Number of Groups Measured[5]			
Number of Groups Exceeding Servicing Threshold for Three Months[6]			
Number of Groups Exceeding Servicing Threshold for One Month[7]			
Number of Groups Exceeding Design Blocking Objectives for Three Months[8]			

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1 The first month of the reported quarter.

2 The second month of the reported quarter.

3 The third month of the reported quarter.

4 The total number of common trunk groups for which the reporting entity is responsible. Common trunk groups are trunk groups between the LEC end office

and the LEC access tandem or IC POP that carry Feature Group B, C, and D access traffic, and intraLATA traffic.

5 The number of common trunk groups measured during the period of the report.

6 The number of common trunk groups which have exceeded the carrier's interstate access tariff measured blocking threshold for three or more consecutive months. Trunk group servicing thresholds have been established in the Interexchange Carriers Compatibility Forum (ICCF) and T1Q1 Industry Forum, and are included in tariffs kept on file with the Commission. Servicing thresholds are set so that, when they are exceeded, there is a statistical probability that blockage is exceeding the designed blocking objective. Servicing thresholds are generally about 2 percent for equal access trunks, and 3 percent for non-equal access trunks.

7 The number of common trunk groups which have exceeded the carrier's interstate access tariff measured servicing threshold for one or more consecutive months.

8 The number of common trunk groups which have exceeded equipment design blocking objectives for three or more consecutive months. Design blocking objectives are established by equipment manufacturers, and range from 0.5 percent to 1.0 percent.

SERVICE QUALITY REPORT

COMPANY:
STUDY AREA:
PERIOD:
COSA:

Table 5
Total Switch Downtime

	Total Number of Switches	Total Switch Downtime[1]	Percentage Unscheduled[2]	Cumulative Outage Due to Incidents Under Two Minutes
MSA[3]				
Non-MSA				
Switches Under 1000 Lines[4]				
Switches 1000-4999 Lines				
Switches 5000-9999 Lines				
Switches 10000-19999 Lines				
Switches Over 20000 Lines				

Attach to this report a list of each occurrence of switch downtime of two or more minutes in duration, specifying the switch, the number of working network access lines served by the switch, whether the switch is located in an MSA, and the duration of each incident in minutes and seconds.[5]

1 The loss of all call processing capability for an end office or access tandem. Report all downtime on this line, in seconds.

2 Percentage of downtime that is not scheduled for maintenance or network upgrade purposes.

3 MSAs, or Metropolitan Statistical Areas, are defined by the Department of Commerce in a list released following each decadal census. An MSA includes at least one city with a minimum population of 50,000, or a Census Bureau-defined urbanized area of at least 50,000 population located in an area with a minimum population of 100,000. See 45 Fed. Reg. 956 (1980). This definition remains in effect until the new list of metropolitan areas is issued in June 1992.

4 Switching entities serving fewer than 1000 access lines. Switching entities are assemblies of equipment designed to establish connections between lines and trunks. Switching entities include local class 5 switching machines and any associated remotes. Switches designed exclusively for access tandem, class 4, or operator services are not reported here. There may be more than one switching entity per central office or wire center.

5 The Bureau is planning to allocate 100 lines in our ARMIS database for this information, assuming that no LEC would have more than 100 listings in one study area in one quarter. We invite comment on whether 100 lines of data would be sufficient or excessive.

SERVICE QUALITY REPORT

COMPANY:
STUDY AREA:
PERIOD:
COSA:

Table 6
Service Quality Complaints[1]

	MSA	Non-MSA
Number of Lines to Business Users		
Federal Complaints[2] from Business Users		
State Complaints[3] from Business Users		
Number of Lines to Residential Users		
Federal Complaints from Residential Users		
State Complaints from Residential Users		

1 "Service quality complaints" are complaints pertaining to service quality. This term does not include complaints relating to billing, operator services or 900 services.

2 Federal complaints are complaints filed with the Commission.

3 State complaints are complaints filed with a state regulatory agency.

SERVICE QUALITY REPORT

COMPANY:
STUDY AREA:
PERIOD:
COSA:

Table 7
Post-dial Delay[1]

	Total Number of End Offices	Number of End Offices Tested	Average Post-dial Delay
End Offices with Electromechanical Switches			
End Offices with Analog Switches			
End Offices with Digital Switches			
End Offices Equipped with SS7			
Total			

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1 Post-dial delay is "the interval that begins when the caller completes dialing ... and ends when the LEC has delivered the call to the [interexchange carrier's] point of presence." Provision of Access for 800 Service, CC Docket No. 86-10, 4 FCC Rcd 2824, 2826 n.26 (1989). See also Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786, 6828 & n. 464.

SEMIANNUAL SERVICE QUALITY REPORT

Table 1[1]
Customer Satisfaction

We will use the current Semiannual Customer Satisfaction report.

Table 2
Dial Tone Response

We will use the current Semiannual Dial Tone Response report.

Table 3
Transmission Quality

We will continue to collect the information in the current Transmission Quality report. In addition, we propose to collect information on availability, error-free minutes, and bit error rate to attempt to measure data transmission quality. We invite comment on the usefulness and measurability of these or other data transmission criteria, and the most appropriate way to express these measurements. We also invite comment on the usefulness and practicability of collecting this data disaggregated into MSA and non-MSA categories.

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1 Absent standardization, the customer satisfaction reports cannot be filed in ARMIS. They will accordingly continue to be filed with the Industry Analysis Division.

INFRASTRUCTURE REPORT
TABLE I: SWITCHING EQUIPMENT

COMPANY:
STUDY AREA:
PERIOD:
COSA:

EQUIPMENT TYPE	(a) Total Study Area	(b) within MSA[1]	(c) non-MSA
SWITCHING ENTITIES/LINES IN SERVICE			
Total Number of Switching Entities[2]			
Total Number of Lines in Service[3]			

- continued -

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1 MSAs, or Metropolitan Statistical Areas, are defined by the Department of Commerce in a list released following each decadal census. An MSA includes at least one city with a minimum population of 50,000 and the surrounding area, or a Census Bureau defined urbanized area of at least 50,000 population located in an area with a minimum population of 100,000. See 45 Fed. Reg. 956(1980). This definition remains in effect until the new list of metropolitan areas is issued in June 1992. These reports require that facilities within any MSA in the Study Area be reported in Column (b), and facilities that are not within any MSA be reported in Column (c).

2 Switching entities are assemblies of equipment designed to establish connections between lines and trunks. Switching entities include local, class 5 switching machines and any associated remotes. Switches designed exclusively for access tandem, class 4, or operator services are not reported here. There may be more than one switching entity per central office or wire center.

3 Access Lines include all classifications of local exchange telephone service, including individual lines, party line access, PBX access, Centrex access, Coin access, Foreign Exchange access, WATS access, etc.

TABLE I, Continued

EQUIPMENT TYPE	(a) Total Study Area	(b) within MSA	(c) non-MSA
By Type of Switch:[4]			
E/M Switches			
% of Total Entities			
E/M Lines Served			
% of Total Lines			
ASPC Switches			
% of Total Entities			
ASPC Lines Served			
% of Total Lines			
DSPC Switches			
% of Total Entities			
DSPC Lines Served			
% of Total Lines			
Switches Equipped for Equal Access[5]			
% of Total Entities			
Access Lines with Equal Access			
% of Total Lines			
Touch-Tone Capable Switches			
% of Total Entities			
Access Lines with Touch-Tone Capability			
% of Total Lines			

- continued -

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4 E/M = Electro-Mechanical, i.e., Step-by-Step and Crossbar; ASPC = Analog Stored Program Controlled; DSPC = Digital Stored Program Controlled. The sum of these types of switches and associated access lines equals total number of switching entities and total number of lines in service.

5 Number of local switching entities equipped for equal access, Feature Group D, service. The corresponding number of access lines served by these offices is shown as "Access Lines with Equal Access."

TABLE I, Continued

	(a) Total Study Area	(b) within MSA	(c) non-MSA
Switches Equipped with CCSS7[6]			
Local Switches			
% of Total Local Switches			
Tandem Switches			
% of Tandem Switches			
Access Lines with Access to CCSS7			
% of Total Lines			
Switches Equipped with ISDN[7]			
% of Total Entities			
Lines with Access to ISDN			
% of Total Lines			
ISDN Customer Interfaces Equipped			
Basic Rate ISDN (BRI)[8]			
Primary Rate ISDN (PRI)[9]			

---

6 Local and tandem switches equipped with CCSS7, including remotes; includes both 1AESS and Digital Stored Program Control switching entities equipped with CCSS7. In the subcategories, any switch used as a local switch is counted as such. The corresponding number of access lines served by those switches is shown as access lines with access to CCSS7. Any switch with tandem capability is counted as a tandem switch. Since some switches are used for both local and tandem switching, the sum of the two subcategories may be greater than the total CCSS7 category.

7 Switching entities that are equipped with ISDN. The corresponding number of access lines served by these offices is shown as access lines with access to ISDN.

8 Basic Rate ISDN consists of two Bearer Channels at 64 Kilobits/second and one Delta Channel at 16 Kilobits/second. Quantities reflected are the number of (2B+D) BRI interfaces equipped.

9 Equivalent Primary Rate ISDN interfaces are generally configured as 23 Bearer Channels and one delta channel, all at 64 Kilobits/second. Quantities reflected are the number of equivalent PRI (23B+D) ISDN interfaces equipped, excluding interoffice PRI ISDN interfaces.

INFRASTRUCTURE REPORT
TABLE II: TRANSMISSION FACILITIES

COMPANY:
STUDY AREA:
PERIOD:
COSA:

	(a) Total Study Area
TOTAL SHEATH MILES[1]	
Copper[2]	
Fiber	
Other[3]	
INTEROFFICE WORKING FACILITIES	
Total Circuit Links[4]	
Baseband	
Analog CXR	
Digital CXR	
Total Carrier Links (Spans)[5]	
Analog	
Copper	
Radio	
Digital	
Copper	
Radio	
Fiber	

- continued -

1 Sheath miles include loop, interoffice, and toll sheath miles.

2 Twisted pairs.

3 Includes aluminum, coaxial, miscellaneous.

4 Circuit Links are those individual segments of the network that an individual circuit rides on. In the case of a circuit routed through offices A-B-Z, where the segment from A-B is baseband and the segment from B-Z is analog carrier, each segment is a circuit link.

5 Carrier Links are those assignable segments of the interoffice network on which 4 kHz bandwidth (single voice channel) signals are multiplexed. All carrier links are counted on this 4 kHz basis for purposes of this report.

TABLE II, Continued

	Total Study Area
LOCAL LOOP[6]	
Total Working Channels[7]	
Total Copper	
Baseband	
Analog CXR	
Digital CXR	
Fiber Digital CXR	
Other	
Total Equipped Channels[8]	
Total Copper	
Baseband	
Analog CXR	
Digital CXR	
Fiber Digital CXR	
Other	

- continued -

---

6 Table includes analog-type services only; excludes ISDN.

7 Working channels are on a 4 kHz bandwidth (single voice channel) basis. Working channels originating from a remote switch are treated the same as if the channels originated in the host central office. All reports of working channels are counted on this 4 kHz basis for purposes of this report.

8 Equipped channels are on a 4 kHz bandwidth (single voice channel) basis. Equipped channels originating from a remote switch are treated the same as if the channels originated in the host central office.

TABLE II, Continued

	Total Study Area
Pairs Terminated at the Main Frame and Fiber to Customers	
Copper Pairs Terminated at Main Frame	
Fiber Strands in Central Offices[9]	
Fiber to Buildings[10]	
Fiber to Customers[11]	

---

9 Number of individual fiber strands in central offices.

10 Number of buildings equipped by fiber from central office.

11 Number of individual fiber strands to customers other than on fiber trials.

INFRASTRUCTURE REPORT
TABLE III: ADDITIONS AND BOOK COSTS

COMPANY:
STUDY AREA:
PERIOD:
COSA:

	(a) Total Study Area
Total Number of Access Lines in Service	
Access Line Gain[1]	
Total Gross Capital Expenditures[2]	

1 Access line gain is defined as Inward Movement less Outward Movement.

2 The dollar amount of investment additions to accounts 2110, 2210, 2220, 2230, 2310, 2410, 2680, and 2690 during the current reporting period. See also ARMIS Report 43-02, Row 260, Column (ac). Gross capital expenditures are consistent with Form M and ARMIS.

B. Service Categories

Circuit Switched Line-Business line. PBX. Centrex. WATS. Mobile. Feature Group A. Foreign Exchange.

Circuit Switched Trunk-Feature Group B. Feature Group D. DID (Line and Trunk)

Packet Switched Services (X.25 and X.75)- Packet DDD Access Line. Packet Synchronous Access Line. Packet Asynchronous Access Line

Dedicated Metallic-Protection Alarm. Protection Relaying. Control Circuit

Dedicated Telegraph Grade-Telegraph Grade 75 Baud. Telegraph 150 Baud

Dedicated Voice Grade-Voice:Non-Switched Line. Voice Switched Line. Voice Switched Trunk. Voice and Tone - Radio Land Line. Data Low Speed. Basic Data and Voice. Voice and Data-PSN Access Tie Trunk. Voice and Data-SSN Access. Voice and Data-SSN-Intermachine Trunk. Data Extension-Voice Grade Data. Protection Relay Voice Grade. Telephoto and Facsimile

Dedicated Program Audio-Program Audio 200-3500 HZ. Program Audio 100-5000 HZ. Program Audio 50-8000 HZ. Program Audio 50-15000 HZ

Dedicated Video-TV Channel-One Way 15kHz Audio. TV Channel-One Way 5 kHz Audio

Dedicated Digital - Digital Voice Circuit. Digital Data-2.4kb/s. Digital Data-4.8kb/s. Digital Data-9.6kb/s. Digital Digital Data-56kb/s

Dedicated High Capacity Digital- 1.544 MBPS BSA

Dedicated High Capacity Digital (Greater than 1.544 MBPS)-Dedicated Digital-3.152 MBPS. Dedicated Digital-6.312 MBPS. Dedicated Digital-44.736 MBPS. Dedicated Digital- 45 MBPS or Higher

Dedicated Alert Transport

Dedicated Derived Channel

Dedicated Network Access Link (DNAL)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements for Cost Support Material To Be Filed with Annual Access Tariffs

ORDER

Adopted: March 13, 1991; Released: March 13, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On February 6, 1991, we released an Order[1] in the above-captioned proceeding to establish Tariff Review Plan (TRP) guidelines for annual access tariff filings to be made by local exchange carriers (LECs) on April 2, 1991. The *1991 TRP Order* discussed the history of our TRP guidelines, provided TRP formats for Tier 1 and Tier 2 companies, defined terms, described changes from last year's TRP, and established a schedule for the access tariff proceeding. We set February 19, 1991 as the deadline for filing petitions for waiver of the *1991 TRP Order*.

2. Pacific Bell (Pacific), Rochester Telephone Corporation (Rochester), Southern New England Telephone Company (SNET), and Utelco, Inc. filed petitions for waiver of the *1991 TRP Order*. In addition, on February 24, 1991, GVNW, Inc., filed a letter seeking clarification of several issues relating to the annual access tariff filing. American Telephone and Telegraph Company (AT&T) filed an opposition to certain of the requested waivers. In this Order we address each of the waivers requested in the petitions.[2]

II. PLEADINGS

A. Petitions

3. Pacific asks us to allow it to treat as an exogenous cost a support payment that it makes to Nevada Bell. Pacific notes that it reflected this payment, which enables Pacific and Nevada to charge the same Carrier Common Line (CCL) rate, in its 1989 and 1990 annual access tariff filings. Pacific states that the amount of this payment is affected by Nevada's Subscriber Plant Factor (SPF) and that the effects of SPF reductions are required to be included in the annual access tariff filing under Section 61.45(d)(3) of the Commission's Rules, 47 C.F.R. § 61.45(d)(3). Pacific argues that its payment to Nevada should be treated as an exogenous cost because it is similar to NECA support obligations which are required to be treated as exogenous costs under Section 61.45(d)(1)(iv) of the Commission's Rules, 47 C.F.R. § 61.45(d)(1)(iv). Pacific Petition at 1-3.

4. Pacific also requests that we waive Section 61.45(d)(3) of the Commission's Rules in order to allow it to reflect the effects of completed amortization of embedded station connection costs as exogenous costs. Pacific believes that its July 1, 1991 rates should be reduced to reflect full recovery of these capitalized costs. In order to develop its exogenous cost adjustment, Pacific proposes to remove one-half of the net investment and related amortization expense from its 1990 actual results. Approximately 99.9 percent of the cost reductions resulting from the completed amortization would be assigned to the Common Line basket with the balance assigned to the Special Access basket. *Id.* at 3-5. Finally, Pacific requests a waiver of Sections 69.104(c) and (d) of the Commission's Rules, 47 C.F.R. §§ 69.104(c), (d), to permit it to calculate its Multiline End User Common Line (MEUCL) charge based on historical, rather than forecast, data. Pacific argues that this would reduce administrative burdens on the carrier and on the Commission. *Id.* at 5-6.

5. Rochester states that a number of its subsidiaries will concur in its tariff for the first time. Rochester notes that we have previously granted it waivers of TRP requirements which we have stated need not be renewed each year. Nevertheless, in order to eliminate any uncertainty, Rochester requests on behalf of itself and Ogden Telephone Company (Ogden), that we continue the waivers we have granted Rochester in the past. Rochester Petition at 1-3. These waivers have allowed carriers to maintain the Special Access surcharge at $25; to establish and maintain an information surcharge rate element, and to establish and maintain a local transport rate element that combines dedicated and common transport costs. *Id.* at 4-8. Finally, Rochester seeks waiver, on behalf of Ogden, of the requirement that Tier 2 carriers furnish their TRP data in computerized form. Rochester argues that, under the circumstances, a mechanized filing would be unduly burdensome. *Id.* at 8-9.

6. SNET requests an extension until April 15 of the filing date for Charts COS-7 (P) and COS-7 (H). SNET claims that it needs a minimum of 60 days from the release of the *1991 TRP Order* to accurately complete these charts. SNET Petition at 4. In addition, SNET proposes to include in its April 2 filing "approximately twenty-five key cost items previously used by the Commission" in its review of access tariff filings. *Id.* Utelco, a Tier 2B company, states that it will file a tariff that contains only end user charges and will continue to concur in the NECA tariff for all remaining access elements. Utelco requests waiver of the *1991 TRP Order* to the extent that it would require Utelco to file a TRP for its traffic sensitive rates. Utelco Petition at 1-3. Finally, in a letter to the staff of the Tariff Division, GVNW notes that two of its issuing carriers intend not to file access tariff revisions April 2 because their rates have not been in effect for a full year. [3]

B. Opposition

7. AT&T opposes Pacific's request to use historical data in developing its MEUCL. AT&T argues that Pacific fails to quantify the administrative burden that it claims justifies its request and does not distinguish itself from other carriers subject to this requirement. AT&T concludes that, because Pacific has developed forecasts for this element in the past, it should not be particularly burdensome to do so again. AT&T Opposition at 2-3. In addition, AT&T opposes SNET's request for an extension of time. AT&T argues that the requested extension would impair its ability to assess SNET's compliance with the Commission's Rules. AT&T notes that Charts COS-7 (P) and COS-7 (H) are not substantially changed from last year and concludes that SNET has failed to demonstrate that the requested extension is warranted. *Id.* at 3-5.

III. DISCUSSION

8. We note that the waivers requested by Pacific are also the subject of its pending petition for reconsideration of the Commission's order adopting price cap regulation for the LECs.[4] Under these circumstances, we are not inclined to grant waivers of these Rules. These issues will not be resolved until after the LECs make their annual access tariff filing on April 2. Pacific must assume for purposes of making this filing that the currently effective rules will apply and its filing should comport with these rules. Pacific may wish to file illustrative tariff pages and support materials reflecting the effects of the rule changes it is seeking in its petition for reconsideration.

9. We grant the waivers requested by Rochester. As Rochester observes, the waivers that we have granted it in connection with prior annual access tariff filings were intended to be continuing and should be viewed as applying to Rochester's subsidiaries as well. We conclude that Utelco does not require a waiver of the *1991 TRP Order* or of any of the Commission's Rules. It was not our intention to require carriers to file TRPs for access elements for which they do not file tariffs. We also waive Section 69.3(f) of the Commission's Rules on behalf of Dubois and C-R, two of GVNW's issuing carriers.

10. We also grant SNET's request for an extension of time to file Charts COS-7 (P) and COS-7 (H). We do not believe that this delay should unduly complicate the efforts of interested parties and the Commission staff in reviewing the annual access tariff filing. Finally, we have made some minor editorial modifications to Charts IND, EXG and RTE in the price caps TRP and Charts COS-3, COS-4, DMD-1, and REV-1 in the Tier 1 TRP. These charts are provided in Attachment A to this Order. We also wish to clarify that Tier 1 carriers need not provide COS-1(H) in mechanized format, as that chart will have been filed in mechanized format with ARMIS.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, that the petitions for waiver filed by Pacific Bell, Rochester Telephone Corporation, Southern New England Telephone Company, and Utelco, Inc., ARE GRANTED to the extent indicated above and otherwise ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Commission Requirements for Cost Support To Be Filed with 1991 Annual Access Tariffs, DA 91-147, released Feb. 6, 1991 (Com.Car.Bur.) (*1991 TRP Order*).

[2] Several waivers that are currently in effect and will apply to this year's filing are unopposed.

[3] Letter from C. Douthit to R. Smith, dated Feb. 24, 1991.

[4] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786 (1990).

ATTACHMENT A

FILING ENTITY:

IND-1
Page 1 of 1

1991 ANNUAL FILING
PRICE CAP TARIFF REVIEW PLAN
INDICES

		PROPOSED PCI	PROPOSED API	PROPOSED SBI	UPPER SBI LIMIT	LOWER SBI LIMIT	EXISTING PCI	EXISTING API	EXISTING SBI
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	Common Line Basket								
100	End User Common Line	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
110	Carrier Common Line			N/A	N/A	N/A			N/A
120	Total Commor Line		N/A	N/A	N/A	N/A		N/A	N/A
	Traffic Sensitive Basket								
130	Local Switching	N/A	N/A				N/A	N/A	
140	Local Transport	N/A	N/A				N/A	N/A	
150	Information	N/A	N/A				N/A	N/A	
160	Total Switched Access			N/A	N/A	N/A			N/A
	Special Access Basket								
170	VG, Wats, Metallic, & Telegraph	N/A	N/A				N/A	N/A	
180	Audio & Video	N/A	N/A				N/A	N/A	
190	High Caps & DDS	N/A	N/A				N/A	N/A	
200	DS-1 Sub-Cat	N/A	N/A				N/A	N/A	
210	DS-3 Sub-Cat	N/A	N/A				N/A	N/A	
220	Wideband	N/A	N/A				N/A	N/A	
230	Total Special Access			N/A	N/A	N/A			N/A
	Interexchange Basket								
240	Total Interexchange			N/A	N/A	N/A			N/A

NOTES: (1) For row 110(A) AND 110(F), show hypothetical capped CCL per minute rate, i.e., CCL MOU rate from Section 61.46(d) of the rules.
(2) For 110(B), show average CCL MOU rate, i.e., chart RTE-1, sum of row 140-170(E) divided by associated minutes.
(3) For 110(G), show average CCL MOU rate, i.e., chart RTE-1, sum of row 140-170(D) divided by associated minutes.

FILING ENTITY:

TRAFFIC SENSITIVE
EXOGENOUS COST CHANGES
($000)

		SPF TRANSITION (A)	DEM TRANSITION (B)	LTS/TRS (C)	OTHER (D)	TOTAL (E)
	REVENUE EFFECT					
300	Depreciation Expense			N/A		N/A
310	Expense Less Depreciation			N/A		N/A
320	Taxes Less F.I.T.			N/A		N/A
330	Net Return			N/A		N/A
340	F.I.T.			N/A		N/A
350	Uncollectible Rev. & Other Adjustments			N/A		N/A
360	Revenue Effect			N/A		
	RATE BASE					
370	Total Plant In Service			N/A		N/A
380	Other Rate Base Items			N/A		N/A
390	Depreciation Reserve			N/A		N/A
400	Accum. Deferred Inc. Tax			N/A		N/A
410	Net Rate Base			N/A		N/A

NOTE: Total may not equal sum of changes due to interactive effects.

FILING ENTITY:

SPECIAL ACCESS
EXOGENOUS COST CHANGES
($000)

		SPF TRANSITION (A)	DEM TRANSITION (B)	LTS/TRS (C)	OTHER (D)	TOTAL (E)
	REVENUE EFFECT					
500	Depreciation Expense			N/A		N/A
510	Expense Less Depreciation			N/A		N/A
520	Taxes Less F.I.T.			N/A		N/A
530	Net Return			N/A		N/A
540	F.I.T.			N/A		N/A
550	Uncollectible Rev. & Other Adjustments			N/A		N/A
560	Revenue Effect			N/A		
	RATE BASE					
570	Total Plant In Service			N/A		N/A
580	Other Rate Base Items			N/A		N/A
590	Depreciation Reserve			N/A		N/A
600	Accum. Deferred Inc. Tax			N/A		N/A
610	Net Rate Base			N/A		N/A

NOTE: Total may not equal sum of changes due to interactive effects.

FILING ENTITY:

INTEREXCHANGE
EXOGENOUS COST CHANGES
($000)

		SPF TRANSITION (A)	DEM TRANSITION (B)	LTS/TRS (C)	OTHER (D)	TOTAL (E)
	REVENUE EFFECT					
700	Depreciation Expense	N/A	N/A	N/A		N/A
710	Expense Less Depreciation	N/A	N/A	N/A		N/A
720	Taxes Less F.I.T.	N/A	N/A	N/A		N/A
730	Net Return	N/A	N/A	N/A		N/A
740	F.I.T.	N/A	N/A	N/A		N/A
750	Uncollectible Rev. & Other Adjustments	N/A	N/A	N/A		N/A
760	Revenue Effect	N/A	N/A	N/A		
	RATE BASE					
770	Total Plant In Service	N/A	N/A	N/A		N/A
780	Other Rate Base Items	N/A	N/A	N/A		N/A
790	Depreciation Reserve	N/A	N/A	N/A		N/A
800	Accum. Deferred Inc. Tax	N/A	N/A	N/A		N/A
810	Net Rate Base	N/A	N/A	N/A		N/A

NOTE: Total may not equal sum of changes due to interactive effects.

FILING ENTITY:

RTE-1
Page 11 of 11

1991 Annual Filing
Price Cap Tariff Review Plan
Interexchange Basket
(Revenues and minutes in thousands)

	Interexchange	Base Period Demand (A)	Current Rates (B)	Proposed Rates (C)	Base Period Demand X Current Rates (D)	Base Period Demand X Proposed Rates (E)	Index Results (F)
2500	Total Basket	N/A	N/A	N/A			N/A
2510	Total API	N/A	N/A	N/A	N/A	N/A	
2520	Total PCI	N/A	N/A	N/A	N/A	N/A	

FILING ENTITY: ANY COMPANY

INTERSTATE ACCESS COST DATA
EFFECT OF VARIOUS ITEMS ON
1991 TEST YEAR AMOUNTS

(Dollars in Thousands)

	COST DATA	TOTAL REGULATED IS ACCESS TEST YEAR (7/91 - 6/92)	FCC RATE OF RETURN CHANGE TO 11.25%	AMORTIZATION OF EMBEDDED INSIDE WIRE	DIFFERENCE BETWEEN PYCOS AND TEST YEAR BAF	DEP. AND AMORT. RESERVE IMBALANCE CORRECTIONS	LOCAL SWITCHING ALLOCATOR TRANSITION (DEM)
		(A)	(B)	(C)	(D)	(E)	(F)
	REVENUE REQUIREMENT						
100	Depreciation Expense						
110	Expense Less Depreciation						
120	Taxes Less F.I.T.						
130	Net Return						
140	F.I.T.						
150	Uncollectible Rev., Interest During Const. & other Rev Adj.						
160	Revenue Requirement						
	RATE BASE						
170	Total Plant In Service						
180	Rate Base Adjustments						
190	Depreciation Reserve						
200	Accum. Deferred Inc. Tax						
210	Net Rate Base						

NOTE: Column (C) includes effects of annual rate base reductions due to ongoing amortizations as well as the effect of completion of amortizations. See Commission Requirements for Cost Support Material To Be Filed with January 1, 1990, Access Tariff Revisions, Memorandum Opinion and Order, DA 89-1255, released September 29, 1989.

Filing Entity: ANY COMPANY

ANALYSIS OF ACCESS ELEMENT COST DATA

(DOLLARS IN THOUSANDS)

COS - 4
PAGE 2 OF 4

		COMMON LINE	TRAFFIC SENSITIVE		OTHER INTERSTATE	TOTAL INTERSTATE	TOTAL COMPANY (SUBJ TO SEPAR)
			SWITCHED	SPECIAL			
		(A)	(B)	(C)	(D)	(E)	(F)
	HISTORICAL PERIOD 7/90 TO 12/90 (1)						
	REVENUE REQUIREMENT						
300	Depreciation						
305	Expense Less Depreciation						
310	Taxes Less F.I.T.						N/A
315	Net Return						N/A
320	F.I.T.						N/A
325	Uncoll. Rev., I.D.C. & Other Rev. Adj.						N/A
330	Revenue Requirement						N/A
335	Access Service Revenues				N/A	N/A	N/A
	RATE BASE						
340	Telephone Plant In Service						
345	Rate Base Adjustments						
350	Depreciation Reserve						
355	Accum. Deferred Inc. Tax						
360	Net Rate Base						

1650

Notes: (1) Actual Operating Statistics. These data should reflect the same accounts and ratemaking treatment included in the forecasts for this period.
(2) From 1989 TRP COS - 4 (3) From 1988 TRP COS - 5

Filing Entity: ANY COMPANY

ANALYSIS OF ACCESS ELEMENT COST DATA

(DOLLARS IN THOUSANDS)

		COMMON LINE	TRAFFIC SENSITIVE		OTHER INTERSTATE	TOTAL INTERSTATE	TOTAL COMPANY (SUBJ TO SEPAR)
			SWITCHED	SPECIAL			
		(A)	(B)	(C)	(D)	(E)	(F)
	HISTORICAL PERIOD 4/89 TO 12/89 ANNUALIZED (1)						
	REVENUE REQUIREMENT						
400	Depreciation						
405	Expense Less Depreciation						
410	Taxes Less F.I.T.						N/A
415	Net Return						N/A
420	F.I.T.						N/A
425	Uncoll. Rev., I.D.C. & Other Rev. Adj.						N/A
430	Revenue Requirement						N/A
435	Access Service Revenues				N/A	N/A	N/A
	RATE BASE						
440	Telephone Plant In Service						
445	Rate Base Adjustments						
450	Depreciation Reserve						
455	Accum. Deferred Inc. Tax						
460	Net Rate Base						
	TEST YEAR FORECAST 4/89 TO 12/89 ANNUALIZED (2)						
	REVENUE REQUIREMENT						
500	Depreciation						
505	Expense Less Depreciation						
510	Taxes Less F.I.T.				N/A	N/A	N/A
515	Net Return				N/A	N/A	N/A
520	F.I.T.				N/A	N/A	N/A
525	Uncoll. Rev., I.D.C. & Other Rev. Adj.				N/A	N/A	N/A
530	Revenue Requirement				N/A	N/A	N/A
535	Access Service Revenues				N/A	N/A	N/A
	RATE BASE						
540	Telephone Plant In Service						
545	Rate Base Adjustments						
550	Depreciation Reserve						
555	Accum. Deferred Inc. Tax						
560	Net Rate Base						

Notes: (1) Actual Operating Statistics. These data should reflect the same accounts and ratemaking treatment included in the forecasts for this period.
(2) From 1989 TRP COS - 4 (3) From 1988 TRP COS - 5

Filing Entity: ANY COMPANY

ANALYSIS OF ACCESS ELEMENT COST DATA
(DOLLARS IN THOUSANDS)

		COMMON LINE	TRAFFIC SENSITIVE		OTHER INTERSTATE	TOTAL INTERSTATE	TOTAL COMPANY (SUBJ TO SEPAR)
			SWITCHED	SPECIAL			
		(A)	(B)	(C)	(D)	(E)	(F)
	HISTORICAL PERIOD 1/88 TO 12/88 (1)						
	REVENUE REQUIREMENT						
600	Depreciation						
605	Expense Less Depreciation						
610	Taxes Less F.I.T.						N/A
615	Net Return						N/A
620	F.I.T.						N/A
625	Uncoll. Rev., I.D.C. & Other Rev. Adj.						N/A
630	Revenue Requirement						N/A
635	Access Service Revenues				N/A	N/A	N/A
	RATE BASE						
640	Telephone Plant In Service						
645	Rate Base Adjustments						
650	Depreciation Reserve						
655	Accum. Deferred Inc. Tax						
660	Net Rate Base						
	TEST YEAR FORECAST 1/88 TO 12/88 (3)						
	REVENUE REQUIREMENT						
700	Depreciation						
705	Expense Less Depreciation						
710	Taxes Less F.I.T.						N/A
715	Net Return						N/A
720	F.I.T.						N/A
725	Uncoll. Rev., I.D.C. & Other Rev. Adj.						N/A
730	Revenue Requirement						N/A
735	Access Service Revenues						N/A
	RATE BASE						
740	Telephone Plant In Service						
745	Rate Base Adjustments						
750	Depreciation Reserve						
755	Accum. Deferred Inc. Tax						
760	Net Rate Base						

Notes: (1) Actual Operating Statistics. These data should reflect the same accounts and ratemaking treatment included in the forecasts for this period.
(2) From 1989 TRP COS - 4 (3) From 1988 TRP COS - 5

FILING ENTITY: ANY COMPANY

DMD-1
Page 1 of 5

COMMON LINE NORMALIZED DEMAND - MOU

(MINUTES IN THOUSANDS)

HISTORICAL PERIOD DERIVED		PREMIUM CCL MOU			NON-PREMIUM CCL MOU			TOTAL CCL MOU			TOTAL CHARGEABLE CCL MOU	
		ORIG.	TERM.	TOTAL	ORIG.	TERM.	TOTAL	ORIG.	TERM.	TOTAL	ORIG.	TERM.
		(A)	(B)	(C) = A+B	(D)	(E)	(F) = D+E	(G) = A+D	(H) = B+E	(I) = C+F	(J) = A+(D*.45)	(K) = B+(E*.45)
100	JAN '88											
105	FEB '88											
110	MAR '88											
115	APR '88											
120	MAY '88											
125	JUN '88											
130	JUL '88											
135	AUG '88											
140	SEP '88											
145	OCT '88											
150	NOV '88											
155	DEC '88											
160	JAN '89											
165	FEB '89											
170	MAR '89											
175	APR '89											
180	MAY '89											
185	JUN '89											
190	JUL '89											
195	AUG '89											
200	SEP '89											
205	OCT '89											
210	NOV '89											
215	DEC '89											
220	JAN '90											
225	FEB '90											
230	MAR '90											
235	APR '90											
240	MAY '90											
245	JUN '90											
250	JUL '90											
255	AUG '90											
260	SEP '90											
265	OCT '90											
270	NOV '90											
275	DEC '90											
PROSPECTIVE PERIOD												
295	TEST PERIOD											

FILING ENTITY: ANY COMPANY

PROSPECTIVE
SWITCHED TRAFFIC SENSITIVE DEMAND - MOU
(MINUTES IN THOUSANDS)

	PREMIUM TRAFFIC SENSITIVE MOU	NON-PREMIUM TRAFFIC SENSITIVE MOU	TOTAL TRAFFIC SENSITIVE MOU	TOTAL CHARGEABLE TRAFFIC SENSITIVE MOU
	(A)	(B)	(C) = A+B	(D) = A+(.45*B)
600 BASELINE DEMAND (NOTE 1)				
605 OUT OF TREND BYPASS				
610 RATE MAKING DEMAND TOTAL (NOTE 2)				

NOTES:

(1) - BASELINE DEMAND WILL INCLUDE TRENDED BYPASS

(2) - RATEMAKING DEMAND TOTAL SHOULD AGREE WITH DMD-1, PAGE 3, ROW 450.

FILING ENTITY: ANY COMPANY

TEST PERIOD 7/91 TO 6/92 ACCESS REVENUE REQUIREMENTS
DEMAND AND RATE RECONCILIATION - SWITCHED ACCESS
(MINUTES AND REVENUES IN THOUSANDS)

		MILEAGE BAND		RATES PER			RATE MAKING DEMAND PER			ANTICIPATED	REVENUE
		LOW	HIGH	MIN/MSG	MIN MILE	LINE OR TRK	MIN/MSG	MIN MILE	LINE OR TRK	REVENUE	REQUIREMENT
	COMMON LINE	(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)(NOTE 1)	(J)
100	Multiline Business EUCL	N/A	N/A	N/A	N/A		N/A	N/A			N/A
110	Single Line Bus. EUCL	N/A	N/A	N/A	N/A		N/A	N/A			N/A
120	Centrex EUCL (Pre 7/83)	N/A	N/A	N/A	N/A		N/A	N/A			N/A
130	Residence EUCL	N/A	N/A	N/A	N/A		N/A	N/A			N/A
140	Sp. Access Line Surchrge	N/A	N/A	N/A	N/A		N/A	N/A			N/A
150	Terminating CCL Premium	N/A	N/A		N/A	N/A		N/A	N/A		N/A
160	Terminating CCL NonPrem	N/A	N/A		N/A	N/A		N/A	N/A		N/A
170	Originating CCL Premium	N/A	N/A		N/A	N/A		N/A	N/A		N/A
180	Originating CCL NonPrem	N/A	N/A		N/A	N/A		N/A	N/A		N/A
190	Common Line - Total	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A		
	INFORMATION										
200	Information - Per Msg.	N/A	N/A		N/A	N/A		N/A	N/A		N/A
210	Information - Per Min.	N/A	N/A		N/A	N/A		N/A	N/A		N/A
220	Information - Surcharge	N/A	N/A		N/A			N/A			N/A
230	Information - Other	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A		N/A
240	Information - Total	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A		
	SWITCHING										
250	Premium Switching	N/A	N/A		N/A	N/A		N/A	N/A		N/A
260	Non-Prem Switching	N/A	N/A		N/A	N/A		N/A	N/A		N/A
270	Other Switching	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A		N/A
280	Switching - Total	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A		

NOTES:
1 - Col. I = C*F or D*G or E*N except Rows 190, 230, 240, 270, 280, 340 and 350 where:
Row 190 Col. I = Sum (Rows 100 thru 180)
Row 230 Col. I = Input Value
Row 240 Col. I = Sum (Rows 200 thru 230)
Row 270 Col. I = Input Value
Row 280 Col. I = Sum (Rows 250 thru 270)
Row 340 Col. I = Input Value
Row 350 Col. I = Sum (Rows 290 thru 340)

FILING ENTITY: ANY COMPANY

TEST PERIOD 7/91 TO 6/92 ACCESS REVENUE REQUIREMENTS
DEMAND AND RATE RECONCILIATION - SWITCHED ACCESS
(MINUTES AND REVENUES IN THOUSANDS)

		MILEAGE BAND		RATES PER			RATE MAKING DEMAND PER			ANTICIPATED REVENUE	REVENUE REQUIREMENT
		LOW	HIGH	MIN/MSG	MIN MILE	LINE OR TRK	MIN/MSG	MIN MILE	LINE OR TRK		
	PREMIUM LOCAL TRANSPORT	(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)(NOTE 1)	(J)
290	Local Trans. - MB1				N/A	N/A		N/A	N/A		N/A
291	Local Trans. - MB2				N/A	N/A		N/A	N/A		N/A
292	Local Trans. - MB3				N/A	N/A		N/A	N/A		N/A
293	Local Trans. - MB4				N/A	N/A		N/A	N/A		N/A
294	Local Trans. - MB5				N/A	N/A		N/A	N/A		N/A
295	Local Trans. - MB6				N/A	N/A		N/A	N/A		N/A
296	Local Trans. - MB7				N/A	N/A		N/A	N/A		N/A
297	Local Trans. - MB8				N/A	N/A		N/A	N/A		N/A
298	Local Trans. - MB9				N/A	N/A		N/A	N/A		N/A
299	Local Trans. - MB10				N/A	N/A		N/A			N/A
300	MMUC Per Line Or Trunk	N/A	N/A	N/A	N/A		N/A	N/A			N/A
301	Termination	N/A	N/A		N/A	N/A		N/A	N/A		N/A
302	Facility	N/A	N/A	N/A		N/A	N/A		N/A		N/A
	NON-PREMIUM LOCAL TRANSPORT										
310	Local Trans. - MB1				N/A	N/A		N/A	N/A		N/A
311	Local Trans. - MB2				N/A	N/A		N/A	N/A		N/A
312	Local Trans. - MB3				N/A	N/A		N/A	N/A		N/A
313	Local Trans. - MB4				N/A	N/A		N/A	N/A		N/A
314	Local Trans. - MB5				N/A	N/A		N/A	N/A		N/A
315	Local Trans. - MB6				N/A	N/A		N/A	N/A		N/A
316	Local Trans. - MB7				N/A	N/A		N/A	N/A		N/A
317	Local Trans. - MB8				N/A	N/A		N/A	N/A		N/A
318	Local Trans. - MB9				N/A	N/A		N/A	N/A		N/A
319	Local Trans. - MB10				N/A	N/A		N/A			N/A
320	MMUC Per Line Or Trunk	N/A	N/A	N/A	N/A		N/A	N/A			N/A
321	Termination	N/A	N/A		N/A	N/A		N/A	N/A		N/A
322	Facility	N/A	N/A	N/A		N/A	N/A		N/A		N/A
330	Transport Installation Per Line Or Trunk	N/A	N/A	N/A	N/A		N/A	N/A			N/A
340	Other Transport	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A		N/A
350	Local Trans. - Total	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A		

NOTES:
1 - Col. I = C*F or D*G or E*N except Rows 190, 230, 240, 270, 280, 340 and 350 where:
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Row 270 Col. I = Input Value
Row 280 Col. I = Sum (Rows 250 thru 270)
Row 340 Col. I = Input Value
Row 350 Col. I = Sum (Rows 290 thru 340)

Before the
Federal Communications Commission
Washington, D. C. 20554

FCC 91-81
38132

In the Matter of	)	
	)	
Evaluation of the Syndication and Financial Interest Rule	)	MM Docket No. 90-162

Order Requesting Further Comment

Adopted: March 15, 1991 ; Released: March 15, 1991

By the Commission:

1. On March 13, 1991, the Commission announced that it had deleted from its agenda at the March 14, 1991 Meeting consideration of a decision in this proceeding. In an effort to give the public a further opportunity to comment on the proposals under consideration, the Commission requests comment on two alternative proposals appended to this Order. Although this further opportunity to comment is not required under the Administrative Procedure Act, the Commission has decided to permit additional comment as a matter of its discretion. Comments must be submitted by March 25, 1991. (Reply Comments will not be permitted.) [1]

2. Accordingly, IT IS ORDERED that under the authority contained in sections 4(i) and 303(r) of the Communications Act of 1934, comments on proposals appended to this Order may be filed on or before March 25, 1991.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Attachment

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[1] Procedures regarding filings are set forth in sections 1.415 and 1.419 of the Commission's Rules. To file formally, participants must file an original and four copies of all comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments should be sent to Office of the Secretary, Federal Communications, Washington, D.C. 20554. Comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

PROPOSAL I

The following proposal is based on the determination that the factual record developed in this proceeding supports granting significant deregulatory relief to the networks, subject to safeguards to prevent or mitigate potential abuses affecting the production and local television station communities which substantially contribute to the diversity we seek to promote and preserve.

1. Network Prime Time Entertainment Limitation

Financial interest and syndication restrictions are eliminated for all network programming other than prime time entertainment.

2. Financial Interest

A. Networks may acquire a financial interest in their entire prime time entertainment schedule, provided that the option period for those programs in which they obtain a financial interest is no longer than two years. (If the financial interest is obtained at any time after a longer option term was agreed to initially, that term shall be reduced to no more than two years from the effective date of the initial agreement.)

B. This option period limit would not apply to the remainder of the network prime time entertainment schedule, i.e., programs in which the network has no financial interest or those it has produced "in-house".

3. Domestic Syndication

Networks may distribute domestically all "in-house" productions airing on their network. The current rule requiring networks to "bulk sell" syndication rights in their in-house productions to an independent distributor for a flat fee is eliminated. Further, to promote network opportunities in the growing international marketplace, "in-house" shall be defined to include foreign co-productions.

A. "In-house" Definition: In-house productions shall be defined as network programs: (1) which are either (a) "solely produced" by the network or (b) co-produced by the network with foreign entities; and (2) which air on that network. "Solely produced" shall be defined as network possession of 100% of the copyright, payment of 100% of the financing, and full creative control. Foreign entities in co-productions shall be defined as

those production entities registered to do business and located outside of the United States.

B. Schedule Cap: While a network may undertake program production without limit (for its own network, another network, or first-run), a network may not fill more than 40% of its prime time entertainment program schedule with its own "in-house" productions.

C. Safeguards: Network domestic syndication of "in-house" productions shall be subject to "warehousing" and affiliate favoritism safeguards and reporting requirements.

(1) Networks must make their "in-house" productions available for airing in syndication within four years of a program's network exhibition or six months after the end of its network run, whichever is sooner.

(2) Affiliate favoritism shall be presumed if an "in-house" production is syndicated to network O&Os or affiliates in more than 40% of the markets where the program has been sold.

(3) Networks must maintain semi-annual reports in their O&O public files, first, certifying their compliance with our rules and, second, listing their "in-house" productions (and the domestic syndication record of such programs) and programs in which they hold a financial interest. In addition, upon Commission request, a network shall make its program contracts available for review.

4. Foreign Distribution

Networks may distribute all of their in-house productions internationally. Further, networks may distribute internationally any shows they produce for other networks or for first-run. Also, networks may obtain a passive financial interest in the foreign distribution of any programs airing on their schedule. In short, networks may either distribute or participate in the foreign distribution revenues of all network programming.

5. First Run Syndication

Networks shall be allowed to produce, but not to distribute domestically, first-run syndication entertainment programming. Networks may hold a financial interest in first-run syndication that is produced "in-house" and syndicated independently subject to our "affiliate favoritism" safeguard. (Further, network first-run programming shall be considered network programming for purposes of the prime time access rule.)

6. **Network Definition**

For purposes of these rules, a network shall be defined as any entity providing 14 or more hours per week of prime time entertainment programming on a regular basis to interconnected affiliates that reach, in aggregate, at least 75 percent of television households nationwide.

7. **Transition Period**

A. A new network's program ownership rights (including financial interests and the right to distribute domestically or internationally) obtained prior to becoming a "network" shall be "grandfathered." A new network and its affiliates also shall be allowed a maximum of 36 months to bring preexisting contractual arrangements into full compliance with our prime time access rule.

B. New networks are otherwise required to comply immediately with the financial interest and syndication rules, in particular as to any program ownership rights obtained subsequent to becoming a "network."

8. **Review**

Review of these modified financial interest and syndication rules shall commence by a date certain four years after their effective date. If, in the Commission's judgment, market conditions at the time of that review are sufficient, these rules may be repealed.

9. **Effective Date**

These rules shall take effect on June 15, 1991, with our financial interest rule applying to all new series or other new prime time entertainment programs originally licensed by a network on or after that date. To avoid unnecessary disruption, the temporary waiver the Commission granted to Fox Broadcasting Company on May 4, 1990 shall remain in effect until, but only until, our new rules become effective.

PROPOSAL TWO

The second proposal would be based on the conclusion that the video programming marketplace has changed so significantly since 1970 that the current financial interest and syndication rules are no longer warranted, and may in fact be harming competition and diversity. Accordingly, the plan proposes to (1) phase out progressively relaxed financial interest and syndication rules in an orderly fashion, while (2) retaining minimally intrusive regulatory safeguards designed to ensure a smooth transition away from existing rules. The objectives of this proposal would be to assure the public access to diverse sources of television programming; foster vigorous competition in all markets involved; eliminate obstacles that decrease the efficiency of market participants and increase the cost or reduce the quality of television programming; and avoid restrictions that interfere unnecessarily with effective U.S. participation in international markets.

Since the rules were adopted in 1970, the number of video programming outlets has expanded substantially, with the number of independent stations more than quadrupling, cable penetration increasing from less than 10 percent to almost 60 percent, and a fourth television network -- Fox -- emerging. As these new outlets have developed, the networks have faced increasing, vigorous competition for video programming product from other program distributors and from each other. In contrast to the dominant position they held in 1970, each network today, on average, purchases only 16 percent of prime time entertainment programming and garners only 22 percent of the audiences viewing such programming. At the same time, the past two decades have witnessed increased concentration in both the program supply and the program syndication markets.

In view of these changes, the second proposal would conclude that the networks would be unable to "extract" financial interests or syndication rights from unwilling program producers, or to pay less than fair market value for such interests or rights. Networks attempting to engage in such anticompetitive activities would simply lose the producer to one of the many other competitors in the program purchase market. The proposal would also determine that there is little evidence that the networks would be able to behave anticompetitively in the syndication marketplace, but would provide safeguards against whatever incentives may exist for a network to take advantage of its relationship with its affiliates.

In addition, the proposal would conclude that competition and diversity in the video programming marketplace would increase as a result of greater network participation because the networks would become alternative sources of financing for independent producers and alternative distributors of programming in the concentrated program syndication market. The proposal also would determine that

significantly relaxing the current restrictions would enhance U.S. competitiveness by enabling the networks to better compete both at home and abroad.

Against this background, comment is sought on the following proposals:

1. Financial Interests. Under one alternative, television networks would be permitted to acquire financial interests from program producers under a three-year transitional rule designed to allow the Commission to monitor industry developments and provide added insurance that industry expectations are not unreasonably undermined. In the first year, a network would be permitted to obtain a financial interest in no more than 25 percent of the total prime time entertainment programming transmitted on its network. That limit would increase to 50 percent in year two, and 75 percent in year three. The financial interest cap would not apply to programs produced in-house by a network, or programs not carried on its network.

Another option would be to allow networks to acquire financial interests in up to 50 percent of their prime time entertainment schedules. This limit would not pertain to in-house productions or programs not aired on the network, and would remain in effect until the rules are reviewed in four years according to the procedures outlined in point 6 below.

2. Domestic Syndication. One domestic syndication alternative would assume adoption of the three-year transitional rule for financial interests described above, and permit the networks to acquire domestic syndication rights in any network program in which they also acquired a financial interest. Alternatively, the networks could be permitted to hold domestic syndication rights in any program in which they also held financial interests under the "50 percent of schedule" option outlined above. Under either proposal, networks would be able to hold domestic syndication rights in first-run programs,[1] programs not aired on their networks, and programs they produce in-house.

Given the extent of modification proposed in longstanding rules, it is prudent to guard against the potential that a network conceivably could take advantage of its relationship with its

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1 With respect to the use of network first-run programming during the prime time access (PTAR) period, it would be possible either to define all such programming as "network" programming for PTAR purposes or to include it within the PTAR limits only when syndicated to a network's own affiliates. Non-network programming produced by a network or at one of its own stations would not be subject to these limits if syndicated by an independent entity.

affiliates. Thus, both of the foregoing proposals would also include "warehousing" and "affiliate favoritism" provisions. Specifically, networks holding domestic syndication rights in given programs would be required to make those programs available for syndication within 5 years of the commencement of the network telecast or within 6 months of the end of the network "run," whichever occurs first. In addition, to address concerns of potential affiliate favoritism, the networks would be required to offer syndicated programming, both off-network and first-run, to non-affiliates on terms and conditions that are no less favorable than those offered to affiliated stations or network owned stations.

3. Foreign Syndication. As with the options described above for domestic syndication, networks would be permitted to acquire foreign syndication rights in any program in which they also acquired a financial interest. This restriction either would assume adoption of the three-year transitional rule for financial interests, or would be subject to review in four years as part of the "50 percent of schedule" alternative. Networks would also be permitted, without limitation, to syndicate outside the United States first-run programs, programs not aired on their networks and programs produced in-house. The warehousing and affiliate favoritism safeguards discussed above for domestic syndication would not apply to network foreign syndication activities.

4. Reporting Requirements. In order to enable the Commission to monitor compliance with the revised financial interest and syndication rules, each network would be required to file an annual report listing: (1) all prime time entertainment programs in which it held a financial interest; (2) all programs in which it held domestic syndication rights; and (3) all stations to whom a program had been syndicated domestically. The networks would also be required, upon Commission request, to file a copy of any program contracts involving financial interests or syndication rights. The Commission would periodically review the annual reports, and any submitted contracts, to assess whether there are any indications of affiliate favoritism or warehousing, and would pursue timely regulatory or enforcement actions if appropriate.

5. Network Definition. Under the first network definition option, a network would be defined as any entity that regularly distributes 14 or more hours of prime time programming per week,[2] on an interconnected basis, to 100 or more television stations. This definition would be designed to encompass entities that provide half of a prime time schedule to their affiliates on a nationwide basis.

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2 For this purpose, prime time would be defined as 7 to 11 p.m. Eastern Standard Time.

Another option would be to base the network definition on the average audience share during prime time. In 1970, the three established networks were subjected to the rules because they represented the only way to reach the mass audience. At the time, this was understood to be roughly one-third of the nation's TV households. Currently, prime time audiences choose among five primary commercial viewing options (in addition to non-commercial PBS): ABC, CBS, NBC, independent television stations (including the Fox stations) and cable television. Each of these alternatives garners approximately one-fifth of the audience.

Under an audience share approach, an entity that provides interconnected over-the-air television service could be treated as a network under the modified rules once it emerged as an alternative to existing viewing options. That is, once an entity obtains an average prime time share that is equivalent to one-sixth of the television audience, the rules would apply (subject to a reasonable phase-in period). This average share would need to be maintained for an adequate measurement interval, such as, for example, eight ratings periods. It would also be necessary to establish a minimum audience reach under this definition to ensure that the rules apply only to entities with nationwide market presence.

6. Presumptive Review. Under the "50 percent of schedule" option outlined above, it would be necessary to establish a date to review the modified rules. Such a process could be modeled after the electronic publishing restrictions imposed on AT&T in the Modification of Final Judgment proceeding, which included a set date for review and presumptive repeal. For purposes of the current proceeding, the Commission could establish a date for review four years after the effective date of the new rules. Presumption would favor repeal. Six months before the date set for this review, interested parties would be given the opportunity to file comments.

7. Waiver of Restrictions. To the extent that any regulations are adopted by the Commission that would limit, in some respects, the power of the networks when negotiating for program product, it may be necessary to specify which program producers, if any, the limitations are designed to protect. For example, it may not make sense to apply such restrictions equally to all program producers, regardless of their size or their prior success in obtaining network exhibition for their program product. In addition, it may be wise to give program producers the authority, at any stage, to knowingly waive whatever government-imposed contractual restrictions might otherwise apply. Such a provision would allow a program producer who believes that those restrictions are adversely limiting his ability to secure desired network financing to waive the applicability of any FCC "safeguards" before the contractual negotiations begin.

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